Supreme Court, U. S.
FILED
FEB 9 1976
MICHAEL RODAK, JR., CLERK

No. 74-1599

In the Supreme Court of the United States

OCTOBER TERM, 1975

JEWELL D. CHANDLER, PETITIONER

v.

RICHARD L. ROUDEBUSH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34a-41a) is reported at 515 F. 2d 251. The opinion of the district court (Pet. App. 30a-33a) is not officially reported; it is unofficially reported at 7 EPD ¶ 9139.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1975. The petition for a writ of certiorari was filed on June 19, 1975, and was granted on October 6, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal employee who brings a civil action under Section 717 of the Civil Rights Act of 1964, following an administrative determination of his employment discrimination claim, is entitled to a trial *de novo* in the district court rather than a review of the administrative decision on the administrative record.

STATUTE AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. IV) 2000e *et seq.*, is set forth in Appendix A to this brief, *infra,* pp. 1a–18a. Portions of the statute that were added or amended in 1972 appear in italics.

The Civil Service Commission's Equal Opportunity Regulations, 5 C.F.R. Part 713, are set forth in Appendix B to this brief, *infra,* pp. 19a–52a.

STATEMENT

Petitioner, a black female, was employed in 1972 as a GS–12 grade level Claims Examiner in the Los Angeles Regional Office of the Veterans Administration. She had begun working for the agency in 1966 as a GS–7 level Claims Clerk and, after several grade promotions over the next three years, was appointed a Claims Examiner in March 1971. In August 1972, petitioner applied for a promotion to a GS–13 Supervisory Claims Examiner (Section Chief) position (A.R. 3).[1] Following a lengthy and thorough selection

[1] "A.R." refers to the Administrative Record.

process (A.R. 177–179), in which petitioner was one of several "highly qualified" candidates interviewed for the position and one of three finalists, the selecting official, Martin Holland, chose a Filipino-American male, Inocentes Dineros, who had been in the division in which the vacancy occurred for approximately 13 years and had been a GS–12 Claims Authorizer for five years.

On September 25, 1972, following the selection of Mr. Dineros, petitioner filed an administrative complaint with the Veterans Administration alleging race and sex discrimination (A.R. 269). After an extensive investigation as required by Civil Service regulations, during which sworn statements were taken from some 20 persons (A.R. 168–225), the investigative report submitted to the agency's Equal Employment Opportunity Officer (App. 24–44) concluded that the evidence supported neither the allegation of race and sex discrimination against petitioner individually (App. 29–31), nor a finding of general race and sex discrimination within the Adjudication Division of the Regional Office (App. 33). The report did conclude, however, that certain personnel practices should be changed in order to alleviate feelings among minority employees that they were subject to discrimination (App. 41).

As required by the regulations, petitioner was furnished a copy of the investigative file and an opportunity for informal adjustment of her complaint.

An adjustment was not achieved, however, and petitioner was notified of her right to an administrative hearing, which she requested (A.R. 154–155). On application of the Veterans Administration, the Civil Service Commission promptly appointed an independent complaints examiner from another agency to conduct the hearing (A.R. 153). Petitioner was notified by the examiner that at the hearing she could be represented by an attorney or other person of her choice, that she could submit the names and titles of any witnesses she wished to call, and that specific reasons would be given for the failure to summon any witness she had so specified (A.R. 150–151). Petitioner responded that she would represent herself because of her familiarity with the policies and procedures involved, and requested that 24 designated witnesses be called (App. 19–23). The complaints examiner determined not to call 15 of these witnesses because they did not appear to have direct knowledge of petitioner's non-selection and because information about the general atmosphere out of which the complaint arose (the expected subject of testimony by several of petitioner's witnesses) had already been sufficiently developed in the complaint file (App. 16–18).

Ten witnesses testified under oath at the two-day hearing held in January 1973.[2] After a Veterans Administration personnel officer had sketched the agen-

[2] Petitioner testified and presented seven witnesses, and the complaints examiner called two witnesses. The agency representative called no further witnesses, relying heavily upon cross-examination and the sworn statements in the investigative file (A.R. 18).

cy's promotion procedures and criteria (A.R. 47–56), the selecting official and two other members of the interviewing panel testified about the relative qualifications of petitioner, the selectee, and another highly qualified applicant. The panel agreed that Mr. Dineros was not as familiar with one area of expertise as petitioner (education claims), but two of the three panel members, including the selecting official, considered Mr. Dineros generally more qualified, in particular because of his experience and ability to motivate people (A.R. 56–69, 93–103). Finally, five other employees testified about the capabilities of petitioner and Mr. Dineros, and petitioner herself testified. All witnesses were subject to direct, cross, and redirect examination by both the agency representative and the petitioner, as well as examination by the complaints examiner.

Subsequent to the hearing, the complaints examiner submitted findings and recommendations as required by Civil Service regulations (A.R. 16–35; Pet. App. 1a–17a). The examiner found that a preponderance of the evidence justified the conclusion that petitioner had been discriminated against on the basis of sex (but not of race) in not being selected for the GS–13 Section Chief position. Specifically, the examiner relied on findings that:

1. Petitioner had demonstrated a greater technical proficiency in three main areas of responsibility (education, pension, and compensation claims) than Mr. Dineros;

2. Petitioner had demonstrated a greater potential to perform in a supervisory capacity than Mr. Dineros;

3. The selecting official had not sufficiently considered petitioner's ability to read computer printouts;

4. Mr. Dineros' law degree did not justify his selection over petitioner, since most Section Chiefs did not have law degrees and petitioner had completed courses established for employees without such degrees; and

5. The selecting official preferred males in supervisory positions, as demonstrated by his previous selection of three men for such positions and his use of the words "he" and "his" in describing the qualifications of a Section Chief. The examiner recommended that petitioner be promoted retroactive to September 17, 1972.

The complaints examiner's decision and the hearing record were transmitted to the Veterans Administration, which was authorized by regulation to adopt, reject, or modify the recommended decision (see p. 60, *infra*). On March 21, 1973, the Acting Assistant General Counsel of the agency determined that the record failed to support petitioner's allegations of either sex or race discrimination (A.R. 36–39; Pet. App. 18a–21a). While agreeing that petitioner had shown a superior ability to read computer printouts and that the selecting official could not justify the choice of Mr. Dineros on the basis of his law degree, the agency rejected the examiner's findings that Mr. Dineros had not demonstrated technical proficiency in

the areas of education, compensation, and pension claims, and that the record indicated a predisposition on the part of the selecting official for males in supervisory positions.

Petitioner then filed a timely appeal of the agency decision to the Civil Service Commission Board of Appeals and Review (subsequently redesignated as the Appeals Review Board). On July 18, 1973, upon review of the entire complaint file and written representations submitted by petitioner, the Board affirmed the agency decision (A.R. 3–9; Pet. App. 21a–29a). After analyzing petitioner's response to the agency's treatment of each of her allegations and examining the statistical picture of the Veterans Administration's Adjudication Division furnished by the initial investigation, the Board concluded (A.R. 8; Pet. App. 28a):

> To summarize, the main evidence that the selecting official discriminated against complainant in not selecting her over the male selectee is the inconsistency of his explanation that the main reason for the selection was his belief in the ability of the selectee to motivate employees whereas he had previously concurred in assigning complainant a higher rating on ability to motivate employees. The Board notes, however, that on the whole blacks and women have fared relatively well in promotions received in the division, and that there are two white female GS–13 Section Chiefs, one of whom received her position before the selecting official was as-

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> signed to his present position, but the other of whom was reassigned laterally with the concurrence of the person acting as selecting official for the promotion in question.
>
> In view of the foregoing, the Board finds that the evidence of record does not support a finding that the agency's failure to promote the complainant resulted from discrimination on the basis of race or sex.

Within 30 days after receiving notice of the Commission's decision, petitioner filed this action in the United States District Court for the Central District of California under Section 717(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. IV) 2000e–16(c). On December 27, 1973, the court granted the government's motion for summary judgment (Pet. App. 30a–33a). Adopting the scope of judicial review expressed in *Hackley* v. *Johnson,* 360 F. Supp. 1247 (D. D.C.) (subsequently reversed *sub nom. Hackley* v. *Roudebush,* 520 F. 2d 108 (C.A. D.C.)), the court found that "the absence of discrimination is firmly established by the clear weight of the administrative record and hence plaintiff is not entitled to any relief" (Pet. App. 33a).

The court of appeals affirmed (515 F. 2d 251; Pet. App. 30a–41a). After conducting its own examination of the administrative record, that court agreed with the district court that "other than the facts that appellant was female and that the person promoted was male, there was no evidence to support appellant's assertion of sex discrimination" (515

F. 2d at 254; Pet. App. 38a). The court of appeals further rejected petitioner's argument that she was entitled to a trial *de novo* in the district court of the issue of discrimination that had been explored in the administrative proceedings (515 F. 2d at 255; Pet. App. 40a–41a):

> Here, the district court was presented with a verbatim transcript of a hearing and a comprehensive civil service review. There was no material flaw in the administrative record on its face; and nothing of substance in appellant's challenge to the administrative proceedings. There was nothing before the district court to indicate that a useful purpose would be served by having a trial de novo. * * *
>
> * * * * *
>
> Where the administrative record affirmatively shows, as it did here, that the challenged personnel action was based upon nondiscriminatory reasons; and where, as here, the record on its face appears to be the product of a fair and impartial hearing; and where, as here, the appellant fails to point out a prejudicial defect in procedure or evidentiary deficits that should be remedied in court, the district court commits no error in deciding the case on the administrative record.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 717(c) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 112, 42 U.S.C. (Supp. IV) 2000e–16(c), provides that a federal employee who claims

to have been discriminated against in employment may bring a civil action in the United States District Court following the timely presentation of his claim to the appropriate administrative authorities. Passage of the 1972 Amendments has resulted in voluminous litigation across the country on the issue of the proper scope of review to be applied by district courts to these administrative determinations.[3] The courts of appeals, like the district courts, have arrived at widely divergent views. The Third, Seventh, and District of Columbia Circuits have held that federal employees are entitled as of right to a trial *de novo* in the district court. *Sperling* v. *United States,* 515 F. 2d 465 (C.A. 3), pending on petition for a writ of certiorari, No. 75–247; *Caro* v. *Schultz,* 521 F. 2d 1084 (C.A. 7), pending on petition for a writ of certiorari *sub nom. Simon* v. *Caro,* No. 75–784; *Hackley* v. *Roudebush,* 520 F. 2d 108 (C.A. D.C.). The Eighth, Ninth, and Tenth Circuits, on the other hand, have held that federal employees are not generally entitled to trials *de novo. Haire* v. *Calloway,* C.A. 8, No. 74–2004, November 17, 1975; *Chandler* v. *Johnson,* 515 F. 2d 251 (C.A. 9) (the instant case); *Salone* v. *United States,* 511 F. 2d 902 (C.A. 10), pending on petition for a writ of certiorari, No. 74–1600.

It is our position that in the ordinary case brought under Title VII, such as the present one, there is no

[3] Well over 50 district court decisions, varying widely in result, have been reported. See, *e.g., Fisher* v. *Brennan,* 384 F. Supp. 174 (E.D. Tenn), affirmed, 517 F. 2d 1404 (C.A. 6); *Ficklin* v. *Sabatini,* 383 F. Supp. 1147 (E.D. Pa.); *Spencer* v. *Schlesinger,* 374 F. Supp. 840 (D. D.C.); *Handy* v. *Gayler,* 364 F. Supp. 676 (D. Md.) (trial *de novo* not required; substantial evidence review); *Guilday* v. *Department of Justice,* 385 F. Supp. 1096 (D. Del.); *McLaughlin* v. *Callaway,* 382 F. Supp. 885 (S.D. Ala.); *Eastland* v. *TVA,* 9 EPD ¶9927 (N.D. Ala.); *Thomas* v. *Department of State,* 8 EPD ¶9622 (D. D.C.) (trial *de novo* not required if administrative record affirmatively establishes an absence of discrimination by the clear weight of evidence); *Griffin* v. *United States Postal Service,* 385 F. Supp. 274 (M.D. Fla.); *Jackson* v. *Civil Service Commission,* 379 F. Supp. 589 (S.D. Texas); *Henderson* v. *Defense Contract Administration Services Region,* 370 F. Supp. 180 (S.D. N.Y.); *Robinson* v. *Klassen,* 9 EPD ¶9954 (E.D. Ark.); *Foster* v. *Civil Service Commission,* 9 EPD ¶9887 (S.D. Texas) (trial *de novo* required).

justification for according the plaintiff an absolute right to a judicial trial *de novo* of the factual issues determined in the administrative proceedings, without regard to the fairness or completeness of those proceedings. It is a basic principle of administrative law that, "in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed." *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 619, n. 17. See *Camp* v. *Pitts,* 411 U.S. 138, 141–142; *United States* v. *Carlo Bianchi & Co., Inc.,* 373 U.S. 709, 715. The language of the 1972 Amendments to the Civil Rights Act is silent as to the type of review that the courts must provide in federal Title VII actions, and certainly cannot be interpreted as a specific authorization of trials *de novo.*

Petitioner's heavy reliance on the legislative history to supply the authorization lacking in the statute's

terms ignores the context in which statements were made and places unwarranted weight upon portions of floor debate that concerned issues unlike those presented here; the few, isolated excerpts of legislative history that specifically address the scope of judicial review offer support for both sides. Indeed, the key item in petitioner's analysis of the legislative history—a sentence in the Senate Committee Report stating that federal employees under proposed amendments to Title VII were to enjoy the same rights in court as private employees—was part of a discussion of a Senate bill that would generally have limited judicial review of private discrimination complaints to a determination of whether an administrative order was supported by substantial evidence.

Our main disagreement with petitioner and *amicus curiae,* however, lies in their fundamental assumption that Congress intended the central role in federal Title VII enforcement to be played by the courts. This assumption is belied by the language of Section 717, which not only requires federal employees to initiate their discrimination complaints in an administrative proceeding and gives the agencies and Civil Service Commission broad remedial authority, but also affirmatively directs the Commission to eliminate federal employment discrimination by a program of ongoing review of departments and agencies and by mandatory enforcement powers. Congress, by deliberately continuing the primary responsibility of the agencies and the Civil Service Commission in federal personnel

EEO matters, recognized that the proper resolution of such grievances could best be achieved, not by isolating them from other employee and personnel considerations, but by adjudicating them in light of the more general obligation to maintain a merit system in federal employment and with the benefit of the substantial expertise accumulated in the Commission's enforcement of that system over the past 90 years.

Thus, while the legislative history clearly indicates a congressional intent to accord federal employees relief from employment discrimination that substantially approximates the relief available to workers in the private sector, the statutory scheme devised for enforcing Title VII rights in federal employment differs significantly from that applicable to employees in the private sector. Unlike the Equal Employment Opportunity Commission (EEOC), which investigates but cannot adjudicate charges of private employment discrimination, the Civil Service Commission is fully empowered to adjudicate federal discrimination complaints after formal evidentiary proceedings and to award complete relief, including retroactive promotion and back pay.

Moreover, the Equal Opportunity Regulations of the Civil Service Commission, 5 C.F.R. 713.201 *et seq.*, as revised to implement the 1972 Amendments, were specifically designed to establish a strong and reliable system of administrative complaint processing by providing for the fair and expeditious resolution of discrimination claims, while giving a complainant

significant procedural rights and safeguards. Because of these crucial distinctions, *de novo* judicial review of discrimination allegations—an essential ingredient of effective Title VII enforcement in the private sector, where administrative proceedings are not designed to adjudicate the Title VII claim and are informal, procedurally deficient, and incomplete, see *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792—would be inappropriate in the federal sector, where employees can obtain full benefits under the Civil Rights Act by court review of the procedural fairness of and the evidentiary and legal bases for the administrative determination. This parallel, equivalent procedure for the enforcement of federal Title VII rights is fully consistent with the repeated legislative pronouncement that federal employees should enjoy the same statutory protection from employment discrimination as private workers.

There are also strong policy reasons for construing Section 717, in the ordinary case, as authorizing judicial review of the administrative record rather than a trial *de novo*. A contrary conclusion would lead to unnecessary delay in the resolution of employment discrimination claims (a result in stark conflict with the intent of Congress), would impair the integrity and retard efforts at improvement of the administrative process, would encourage litigants to belittle the societal and systemic importance of an administrative resolution of their grievances, and would unnecessarily burden the federal judicial system with duplicative and wasteful trials. While such policy considerations may be immaterial where Congress has clearly spoken, they should be determinative in the resolution of the present case. The administrative procedure set forth in the regulations of the Civil Service Commission is fair and fully protects the complaining employee's legitimate interest. If an error of law occurs in the administrative process, it can of course be corrected by the reviewing court; similarly, if, for reasons of structural inadequacy, the administrative record appears incomplete or is otherwise procedurally or substantively deficient, the court possesses the discretion to remedy the defect by supplemental proceedings, including a plenary judicial trial in appropriate cases. We fully recognize that additional proceedings may be necessary, for example, when suit is brought after the agency has delayed more than 180 days without holding an evidentiary hearing or when proof of the complainant's grievance is dependent upon the testimony of a non-governmental employee who cannot be compelled by the complaints examiner to appear at the administrative hearing. We disagree, however, with petitioner's contention that these infrequent exceptions should dictate the general rule.

In all events, there is no justification for granting every federal Title VII complainant a trial *de novo* without regard to the fairness or completeness of the administrative determination of his claims, thereby rendering the administrative proceedings mandated by Congress little more than an inconsequential dress rehearsal for a subsequent court action.

ARGUMENT

SECTION 717 OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT GRANT FEDERAL EMPLOYEES WHO HAVE BEEN ACCORDED AN ADMINISTRATIVE HEARING THE RIGHT TO A DISTRICT COURT TRIAL *DE NOVO* OF THEIR EMPLOYMENT DISCRIMINATION CLAIMS, AND PETITIONER'S CLAIMS WERE PROPERLY DETERMINED ON THE BASIS OF THE ADMINISTRATIVE RECORD

A. THE LANGUAGE AND STRUCTURE OF THE ACT DO NOT MANDATE A TRIAL *DE NOVO*

Section 717(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. IV) 2000e–16(a), pledges the federal government to undertake all personnel actions [4] affecting employees or applicants for employment "free from any discrimination based on race, color, religion, sex, or national origin." Section 717 (b) assigns primary enforcement responsibilities for Section 717(a) to the Civil Service Commission, through annual review and approval of equal employment opportunity plans submitted by each federal department and agency and by adjudication of appeals by aggrieved federal employees from adverse department or agency decisions. To carry out its functions under Section 717(a), the Commission is expressly empowered by Section 717(b) to grant "appropriate remedies, including reinstatement or hiring of employees with or without back pay," and to issue rules, regulations, orders and instructions.

[4] Aliens employed outside the limits of the United States, employees of the General Accounting Office, and employees of the Government of the District of Columbia and of the legislative and judicial branches who do not hold positions in the competitive service, were excluded from the Act's coverage.

The Act also authorizes employees unsatisfied by the administrative resolution of their complaint to file a civil action in the United States District Court. Sections 717(c) and (d) provide:

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit * * * or by the Civil Service Commission upon an appeal * * * or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal * * * until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
>
> (d) The provisions of section 2000e–5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Prior to instituting the civil action in this case, petitioner fully pursued her administrative remedies under the Act, including a detailed investigation and attempts at adjustment of her complaint by the Veterans Administration, a thorough evidentiary hearing before an impartial complaints examiner, and an appeal to the Civil Service Commission. In the proc-

ess, a complete administrative record of petitioner's claim was compiled. In such circumstances, nothing in the language of the Act mandates a trial *de novo* of the identical claim in the district court.[5]

The provision in Section 717(c) for a "civil action" in the district court, on which petitioner places substantial weight (Br. 25–29), certainly does not indicate that a trial *de novo* is required. The Federal Rules of Civil Procedure authorize only one form of action, termed a "civil action," in suits of a civil nature in the United States District Court. Rule 2, Fed. R. Civ. P. Accordingly, causes of action in the district courts are properly denominated "civil actions" by Congress even when substantial evidence review of an agency determination is clearly mandated. See, *e.g.*, Social Security Act, of 1935, 49 Stat. 624, as amended, 42 U.S.C. 405(g) and Section 1878 (f)(1) of the Act, as added by 86 Stat. 1422, and amended by Pub. L. 93–484, 88 Stat. 1459, 42 U.S.C. (Supp. IV) 1395(f)(1).[6] Moreover, when Congress

[5] We discuss the situation where an agency has not taken final action prior to the filing of suit, or where a full administrative record has not been developed, *infra*, p. 66.

[6] This also answers *amicus*' contention (Br. 8, n. 7) that significance should attach to the statute's use of the term "civil action" rather than "petition for review." In a similar vein, the District of Columbia Circuit has stated that "if review of the administrative record was intended, we doubt that Congress would have placed jurisdiction in the District Courts rather than in the Courts of Appeals." *Hackley* v. *Roudebush*, *supra*, 520 F. 2d at 121. But the district courts commonly review administrative proceedings, both where such review is explicitly mandated by statute, as in Social Security cases (see 42 U.S.C. 405(g)), and where it is not, as in judicial review of federal personnel actions not arising under Title VII. See, *e.g.*, *Polcover* v. *Secretary of Treasury*, 477 F. 2d 1223, 1225 (C.A. D.C.), holding that "although cast in the mold of original actions in the district court," federal personnel cases "are disposed of on the basis of the administrative record and should be governed by the principles generally applicable to judicial review of administrative action." See also *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190, 227; *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 443. Contrary to the court of appeals' assertion that review in the district court, rather than in an appellate court, serves "'no viable purpose,'" *Hackley* v. *Roudebush*, *supra*, 520 F. 2d at 121, n. 49, district court review facilitates supplementary evidentiary proceedings in those instances when the administrative record is incomplete. See *infra*, pp. 66–67. In addition, as Professor Jaffe has noted, district court venue often encourages review because the typical plaintiff in certain types of actions (such as actions under Title VII) is a person of modest means. Jaffe, *Judicial Control of Administrative Action* 158 (1965).

has intended the courts to conduct a *de novo* proceeding following administrative action, normally it has explicitly so indicated. See, *e.g.*, Consumer Product Safety Act, 86 Stat. 1217, 15 U.S.C. (Supp. IV) 2059(e)(2); Food Stamp Act, 78 Stat. 707, 7 U.S.C. 2022(c); Perishable Agricultural Commodities Act, 46 Stat. 534, as amended, 7 U.S.C. 499g(c). The absence of such language here is in itself strong evidence of legislative intent not to require *de novo* review in every situation. Cf. *Consolo* v. *Federal Maritime Commission*, *supra*, 383 U.S. at 619, n. 17; *United States* v. *Carlo Bianchi & Co., Inc.*, *supra*, 373 U.S. at 715.

Petitioner's principal contention concerning the language of the Act is that a trial *de novo* is virtually compelled by Section 717(d), which states that federal employee civil actions are to be governed, "as applicable," by the provisions of Sections 706(f) through (k), which apply to private sector actions

under Title VII. Since private litigants seeking to enforce Title VII rights are entitled to a trial *de novo* in the district court, see *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, petitioner asserts that the same result must follow from the incorporation by reference into Section 717 of the provisions of Section 706. We disagree.

None of the provisions of Sections 706(f) through (k) confers, either explicitly or by necessary implication, a right to a trial *de novo,* and none of them is inconsistent with the construction we suggest. Sections 706(f)(1) through (3) contain jurisdiction and venue provisions and terms relating to the EEOC that are applicable only to state, local government, or private employees, and authorize court appointment of an attorney for the plaintiff and waiver of costs; Sections 706(f)(4) through (5) require the district court to "hear and determine" the case expeditiously—a requirement that no more indicates a trial *de novo* than it does a hearing on a summary judgment motion.[7] See Rule 56(c), Fed. R. Civ. P.

Section 706(g) empowers the district court to enjoin discriminatory practices and to order appropriate af-

[7] While Section 706(f)(5) authorizes the district court to appoint a master if the case has not been scheduled "for trial" within 120 days after issue has been joined, that provision does not purport to require a trial *de novo*, or even a trial, in every case. "As applicable" to Section 717 proceedings, that provision could be utilized where a trial would be appropriate because of failure by the agency to act upon an administrative complaint or where supplementary evidentiary proceedings are necessary (see p. 66, *infra*).

firmative relief, including reinstatement or hiring of employees with back pay; Section 706(h) relieves the district court in Title VII cases of the restrictions imposed by the Norris-LaGuardia Act, Sections 1–15, 47 Stat. 70, 29 U.S.C. 101–115, on the issuance of injunctions and restraining orders; Section 706(i) authorizes the EEOC to institute court proceedings, in its discretion, to compel compliance with court orders; Section 706(j) provides for appeal to the United States court of appeals under the normal rules of 28 U.S.C. 1291, 1292; and Section 706(k) allows the district court to award attorney's fees to the prevailing party, including an award of costs against the United States. Thus, these sections, incorporated by reference "as applicable" into Section 717, are not the source of a right of trial *de novo* for private litigants under Title VII and, accordingly, confer no such right in federal employee actions.[8]

[8] The legislative history indicates that, in incorporating Sections 706(f) through (k) into the federal employment provisions, Congress was mainly concerned with the attorney's fee and costs provisions. Senator Javits sought to amend an amendment of Senator Dominick (which was subsequently rejected) that, *inter alia*, would have removed the incorporation by reference from the Senate bill. In urging that the incorporation by reference be retained, Senator Javits remarked:

> If you refer to those provisions, insofar as they are applicable, you find that the main point is that where the complainant is suing in court, you have arrived at the stage of the proceeding where he has that remedy, and in such circumstances as the court may deem just, the court may appoint an attorney for the complainant and authorize the commencement of the action without the payment of fees, costs, or security.

118 Cong. Rec. 954 (1972); Legislative History at 868, ("Legislative History" refers to Legislative History of the Equal Employ-

Indeed, if petitioner and the District of Columbia Circuit are correct in asserting that the language of Section 706 "unequivocally accord[s] private sector litigants the right to a trial *de novo*," *Hackley* v. *Roudebush, supra*, 520 F. 2d at 120, this Court could have rested its decisions in *McDonnell Douglas Corp.* v. *Green, supra,* and *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, on the commands of the statutory language of Title VII rather than on a practical determination that the proceedings urged as substitutes for district court trials in those cases—EEOC investigation and attempted conciliation on the one hand and union grievance arbitration on the other—were inadequate to secure the rights granted by the Act. These decisions, however, are not based on the language of Section 706—and in particular not on subsections (f) through (k). As we show *infra* (see pp. 51–54), the crucial findings in *McDonnell Douglas Corp.* and *Alexander* regarding the substantive and procedural inadequacy of administrative and arbitral adjudication of private employment discrimination

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ment Opportunity Act of 1972, 92d Cong., 2d Sess. (Comm. Print 1972), prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare.) In agreeing to Senator Javits' amendment to his amendment, Senator Dominick stated:

> The amendment to strike the language was included because the language to be struck was thought to be inappropriate to the specialized grievance procedures adopted in committee for Federal employees. A closer reading of sec. 706(g) [*sic*, should be (q)] through (w) does indicate that *language for providing attorney's fees and waiving court costs are applicable.*

118 Cong. Rec. 956 (1972) (emphasis added); Legislative History at 872.

claims are inapplicable to the elaborate federal administrative remedial system established under Section 717.

Finally, petitioner contends that the Act's apparent authorization of a civil action prior to the completion of federal administrative proceedings inevitably supports her conclusion that a trial *de novo* is required in the district court. Under Section 717(c), an aggrieved employee is required initially to file his claim with the department or agency that has allegedly discriminated against him. If the final decision by the department or agency is adverse, the complainant has a right of appeal to the Civil Service Commission. Alternatively, he may, within 30 days of his receipt of notice of the department or agency's final decision, file a civil action directly without appealing to the Commission. If the employee does appeal to the Civil Service Commission, he may also bring a civil action within 30 days after receiving notice of the Commission's final decision. In addition, the complainant is authorized to file a civil action if, after the expiration of 180 days from the filing of his initial charge or the filing of his administrative appeal, the department or agency, or the Civil Service Commission, has not yet taken final action on the complaint or the appeal.

We have argued in a related case that an employee must exhaust his administrative remedies under the Act before he may resort to court review. Brief for the Respondents, *Brown* v. *General Services Administration*, pending on writ of certiorari, No. 74–768. Thus, under our interpretation of Title VII, court

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actions would proceed in the absence of an administrative record only in those isolated instances when more than 180 days have elapsed since the filing of an administrative complaint without any department or agency action.[9] 5 C.F.R. 713.281(b). In such cases, a trial *de novo* may well be required in order to effectuate the congressional desire for a speedy resolution of federal employment discrimination disputes. We submit, however, that there is no reason why the inadequacy or incompleteness of an administrative record on those rare occasions—which can be handled

[9] Court review without an administrative hearing also can occur in two other situations. First, an employee may file suit after the department or agency has rejected or cancelled his complaint on non-evidentiary grounds, such as the inapplicability of Title VII or untimely filing. 5 C.F.R. 713.215. Obviously, the district court can review the legitimacy of that action without the need for a complete evidentiary record. Furthermore, if the court concludes that the agency has acted erroneously, the proper course would be to remand for further administrative proceedings, not to hold a trial *de novo*. See, *e.g.*, *United States* v. *Carlo Bianchi & Co., Inc.*, *supra*, 373 U.S. at 718; *Branley* v. *Hampton*, 403 F. Supp. 770, 775, n. 8 (D. D.C.); *Butler* v. *Kleppe*, 9 EPD ¶ 10,054 (D. D.C.); *Harrison* v. *Butz*, 375 F. Supp. 1056 (D. D.C.). Second, an employee may refuse a hearing after the agency fails to achieve adjustment of his complaint. 5 C.F.R. 713.217. A complainant who, by his own conduct, waives his right to an administrative hearing should of course not be permitted to use the lack of an administrative hearing record as a justification for obtaining a trial *de novo*. See *Hackley* v. *Roudebush*, *supra*, 520 F. 2d at 158, n. 201. Moreover, in many such situations, the district court can determine whether the agency's action was justified on the basis of the investigative record required by 5 C.F.R. 713.216. Although *amicus* contends (Br. 15–16, n. 14) that there can be no prospective waiver of an employee's rights under Title VII, this assumes the conclusion that a federal complainant has an absolute right to a trial *de novo* in the district court.

by the district court as circumstances warrant—should necessitate a trial *de novo* for *every* litigant, regardless of the adequacy or completeness of his administrative record. Indeed, the present case, in which petitioner's complaint resulted in protracted administrative proceedings and the compilation of a full hearing record, well illustrates the unreasonableness of a construction of Section 717 that would mandate a *de novo* judicial retrial of every discrimination complaint.

B. THE LEGISLATIVE HISTORY OF THE 1972 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964 DOES NOT INDICATE A CONGRESSIONAL INTENT TO ACCORD EVERY FEDERAL EMPLOYEE A RIGHT TO TRIAL *DE NOVO*

The legislative history of the 1972 Amendments to the Civil Rights Act does not conclusively answer the question whether a trial *de novo* is required in federal Title VII cases. A careful reading of this history, however, does indicate that Congress, in providing a civil action following exhaustion of an employee's enhanced administrative remedies, contemplated that the courts would engage in a review on the administrative record. The fundamental flaw in petitioner's contrary contention, in our view, rests in her seizing upon snippets of legislative debate without a discriminating analysis of the precise subject under debate or the context in which the debate occurred. Thus, while the history indicates that Congress undoubtedly intended to accord federal employees the same substantive Title VII rights enjoyed by their colleagues in private industry, Congress was not con-

cerned that federal workers utilize the identical procedures in enforcing those rights.

The 1972 Amendments to Title VII were considered against a backdrop that included allegations of widespread discrimination in federal employment, compounded by serious doubts that federal employees had redress in court because of sovereign immunity. The Civil Rights Act of 1964, of course, did not apply to federal employment, and federal administrative proceedings were frequently valueless because, among other reasons, effective make-whole relief could not be granted. Moreover, in the private sector, although the EEOC had authority to attempt conciliation in employment discrimination cases, it had no enforcement authority and lacked the power to conduct an evidentiary hearing (although it could conduct an investigation). Section 706, 42 U.S.C. (Supp. IV) 2000e–5.

1. On June 2, 1971, to remedy these deficiencies, the Committee on Education and Labor of the House of Representatives reported H.R. 1746, the so-called "Hawkins Bill" (named after its chief sponsor, Rep. Hawkins), to the House. This bill, *inter alia,* would have given the EEOC authority to hold evidentiary hearings on individual complaints in private sector cases, following an investigation finding reasonable cause to believe the charge of discrimination (H.R. 1746, 92d Cong., 1st Sess. 3–6 (1971); Legislative History at 34–37). If the EEOC found that an employer had engaged in a discriminatory employment practice, it could issue a cease and desist order reviewable in

the court of appeals under a substantial evidence scope of review (H.R. 1746, *supra,* at 7–10; Legislative History at 38–41). If, on the other hand, the EEOC found no reasonable cause or probable jurisdiction or did not act within 180 days of the complainant's initial charge, the employee could file a civil action in the district court (H.R. 1746, *supra,* at 23–25; Legislative History at 54–56). With regard to federal employment, the bill would have transferred Civil Service Commission responsibility in equal employment opportunity matters to the EEOC and authorized a "civil action" by a federal employee following notification of final agency action (H.R. 1746, *supra,* at 28–29; Legislative History at 59–60).

Because of substantial opposition to the Hawkins Bill, a substitute proposal by Rep. Erlenborn was introduced in the House on June 17, 1971 (H.R. 9247, 92d Cong., 1st Sess.; Legislative History at 141–147). This bill would have denied the EEOC cease and desist power, but would have authorized it to bring suit on a complainant's behalf in the district court. There was no provision in the so-called "Erlenborn Substitute" covering discrimination in federal employment and, although the floor debate centered primarily around EEOC cease and desist authority, several Congressmen noted the absence of any such federal anti-discrimination features (117 Cong. Rec. 32095 (1971) (remarks by Del. Fauntroy); 117 Cong. Rec. 32097 (1971) (remarks of Rep. Abzug); 117 Cong. Rec. 32098 (1971) (remarks of Rep. Steiger);

Legislative History at 271, 276, 280). On September 16, 1971, the House accepted the Erlenborn Substitute by a narrow margin and then overwhelmingly passed the bill (117 Cong. Rec. 32111–32113; Legislative History at 312–323). Thus, as initially approved by the House of Representatives, the amendments to Title VII did not extend to federal employment at all and, in private sector cases, contained no provision giving the EEOC power to make binding findings of fact based on an administrative record.

Meanwhile, on September 14, 1971, a bill making substantially the same changes in Title VII as the Hawkins Bill was introduced in the Senate by Senator Williams. The Senate Committee on Labor and Public Welfare reported this bill in amended form (the "Senate Committee Bill") on October 28, 1971 (S. 2515, 92d Cong., 1st Sess.; Legislative History at 344–409).

With respect to the private sector, the Senate Committee Bill granted the EEOC cease and desist power following an evidentiary hearing, and, in the event of timely EEOC action, provided for judicial review on the EEOC administrative record in the court of appeals under a substantial evidence test (S. 2515, *supra,* at 42, 44; Legislative History at 385, 387).[10] Except for a subsequent technical change, the federal employment provisions of the Senate Committee Bill were worded precisely as finally enacted into law. In particular, responsibility for assuring nondiscrimination in federal employment was retained in the Civil Service Commission rather than transferred to the EEOC (as in the Hawkins Bill in the House and in the original Williams Bill) (S. 2515, *supra,* at 62–66; Legislative History at 405–409).

[10] The private sector provisions of the bill at this stage are described in detail *infra*, pp. 39–43.

On the Senate floor, Senator Dominick offered an amendment to the Senate Committee Bill that would have substituted EEOC enforcement authority in the district court for EEOC cease and desist authority, but would have retained the provision for a district court civil action for federal employees (Legislative History at 553–558). This amendment was rejected by a vote of 43–41 on January 24, 1972, and again (following agreement by a narrow margin to a motion to reconsider) by a vote of 48–46 on January 26, 1972 (118 Cong. Rec. 945, 951, 1384; Legislative History at 843, 859, 912).

A filibuster ensued and two attempts at cloture were unsuccessful (118 Cong. Rec. 1972, 2494 (1972); Legislative History at 1211, 1335). Senator Dominick then introduced another amendment (Legislative History at 1499–1504) substituting EEOC court enforcement authority for cease and desist powers in the private sector. When it became evident that passage of this amendment was needed in order to obtain sufficient votes for cloture, the Senate agreed to the Dominick amendment on February 15, 1972 (118 Cong. Rec. 3973 (remarks of Senator Allen), 3979–3980; Legislative History at 1542, 1557, 1561). One

week later cloture was voted, and the Senate passed the bill on the same day (118 Cong. Rec. 4912, 4944 (1972); Legislative History at 1699, 1779). Following a conference in which, *inter alia,* the Senate-passed provisions regarding federal employment discrimination were accepted by the House conferees, the Senate and House of Representatives accepted the conference report on March 6 and 8, 1972, respectively (118 Cong. Rec. 7170, 7573; Legislative History at 1854, 1875). The bill was signed into law on March 24, 1972.

Although several issues were explored in detail during the course of the extended legislative debates on these amendments to Title VII, the central and most heatedly discussed question in both the House and the Senate was whether, in private sector cases, the EEOC should be given cease and desist powers or merely the authority to bring suit on a complainant's behalf in the district court. Discussion of the provisions regarding federal employees was limited. Since the federal employment provisions as eventually enacted were initially prepared in the Senate Committee, and since the House bill as originally passed contained no federal anti-discrimination provisions, the legislative history on the Senate side is the more probative here.

2. While there is little explicit indication in this legislative history of the appropriate scope of court review in federal employee actions, there are repeated, specific assertions of the purposes for passing the federal civil action provisions. The following sentences explaining the rationale behind the fed-

eral employment discrimination section appear unchanged [11] in the Senate Committee Report and in an analysis submitted by Senator Williams, the floor manager of the Senate Committee Bill, on the day of final passage of the Senate bill:

> The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate.

S. Rep. No. 92–415, 92d Cong., 1st Sess. 16 (1971); 118 Cong. Rec. 4923 (1972); Legislative History at 425, 1730.[12]

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[11] For a discussion of the preceding and subsequent language, dealing with the equivalency of federal employee rights to private sector rights, which language did change with the restructuring of private sector procedures through amendment of the Senate Committee Bill, see *infra*, pp. 37–48.

[12] The House Committee Report similarly states:

"Despite the series of executive and administrative directives on equal employment opportunity, Federal employees, unlike those in the private sector to whom Title VII is applicable, face legal obstacles in obtaining meaningful remedies. There is serious doubt that court review is available to the aggrieved Federal em-

None of these reasons articulated as a basis for the federal civil action provision supports the implication of a trial *de novo*. First, Congress was primarily concerned that nearly all federal governmental action in regard to its employees, at least short of discharge, had been considered unreviewable in many courts because of sovereign immunity. See, *e.g., Gnotta* v. *United States,* 415 F. 2d 1271 (C.A. 8) (Blackmun, J.), certiorari denied, 397 U.S. 934; *Blaze* v. *Moon,* 440 F. 2d 1348 (C.A. 5). Thus Senator Cranston, who co-authored the Senate federal employee sections,[13] stated just prior to passage of the Senate bill:

> For the first time, [my Federal Government EEO amendment would] permit Federal employees to sue the Federal Government in discrimination cases—under the theory of Federal sovereign immunity, courts have not generally allowed such suits—and to bring suit either prior to or after CSC review of the agency EEO decision in the case.

ployee. Monetary restitution or back pay is not attainable. In promotion situations, a critical area of discrimination, the promotion is often no longer available. Information and documents contained in Government files are not obtainable since the Freedom of Information Act exempts internal personnel rules. Under the proposed [House Committee Bill], court review, back pay, promotions, reinstatement, and appropriate affirmative relief is available to employees in the private sector; also the Commission has broad powers to conduct an intensive investigation and obtain access to all pertinent records." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 25 (1971); Legislative History at 85.

[13] See 118 Cong. Rec. 4929, 4940, 4949 (1972); Legislative History at 1744, 1768, 1792.

118 Cong. Rec. 4929 (1972); Legislative History at 1744.[14] The waiver of sovereign immunity to permit review of agency equal employment opportunity determinations obviously indicates the desire only to provide a judicial remedy, not to mandate the precise contours of that remedy.

Second, Congress was disturbed by the apparent inability of the Civil Service Commission, the agency that had been responsible for enforcing the ban on discrimination in federal employment as decreed by executive order,[15] to grant full relief to aggrieved employees—relief, such as back pay and immediate advancement, that was considered indispensable to private sector Title VII enforcement. Senator Cranston thus told his colleagues immediately prior to passage of the Senate bill:

> My Federal Government EEO amendment * * * would * * * [e]ntitle an employee to back pay if discrimination has been found to exist—the Government has insisted it does not have legal authority to make such awards.

118 Cong. Rec. 4929 (1972); Legislative History at 1744. Again, the congressional intent to assure that such remedies were available to federal employees, not only in the courts but also in the agencies which were to retain primary responsibility for meeting the prom-

[14] See also 118 Cong. Rec. 4922 (1972) (remarks of Senator Williams); Legislative History at 1727.

[15] See, *e.g.*, Executive Order 11478, 3 C.F.R. 207 (1974); Executive Order 11246, 3 C.F.R. 567 (1966); Executive Order 10590, 3 C.F.R. 237 (1954–1958 Comp.); Executive Order 9980, 3 C.F.R. 720 (1943–1948 Comp.).

ise of equal employment opportunity, does not suggest that a trial *de novo* rather than a court review of the administrative record was intended.

Finally, Congress sought to alleviate the confusion over the proper administrative recourse available to a federal employee alleged to be the victim of discrimination. The statute as enacted, which clarified the administrative mechanism for the adjustment of such grievances, does not on its face grant a right to *de novo* review once the administrative decision has been appealed to the district court. See *supra,* pp. 16–25. And, indeed, if any inference is to be drawn from the clear dual requirements of the 1972 Amendments that (a) an employee first seek administrative relief of his complaint and (b) a strengthened and adequate administrative mechanism be available to adjudicate the complaint and to grant a complete remedy, it is that the courts are not free to disregard the work of the agency and Civil Service Commission and to begin anew.

The legislative debates on the extension of Title VII to federal employees also questioned the adequacy of Civil Service Commission EEO proceedings, including its complaint procedure. See H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 23–24 (1971); S. Rep. No. 92–415, *supra,* at 14–15; 118 Cong. Rec. 4922 (1972) (remarks of Senator Williams); Legislative History at 83–84, 423–424, 1726. The Hawkins Bill, as well as the original Williams Bill, proposed the transfer of Civil Service Commission EEO authority to the EEOC. The

Senate Committee, however, expressly decided to retain Civil Service Commission authority over employment discrimination matters in the federal government, and its recommendation was adopted by both Houses of Congress and by the President. As the Senate Committee Report stated:

> The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for examining the Government's equal employment opportunity program for structural defects which may result in a lack of true equal employment opportunity. Yet, the Committee was persuaded that the Civil Service Commission is sincere in its dedication to the principles of equal employment opportunity enunciated in Executive Order 11478 and that the Commission has the will and desire to overcome any such conflict of interest. In order to assist the Commission in accomplishing its goals and to make clear the Congressional expectation that the Commission will take those further steps which are necessary in order to satisfy the goals of Executive Order 11478, the Committee adopted in Section 707(b)[*sic*] of the bill specific requirements under which the Commission is to function in developing a comprehensive equal employment opportunity program.

S. Rep. No. 92–415, *supra,* at 15; Legislative History at 424.

There was, we submit, ample reason for the congressional determination to preserve, in the area of

EEO complaints, the Commission's "primary responsibility" for federal personnel matters. For the Civil Service Commission, as well as the officials responsible for individual agency personnel administration under the Commission's guidance, is charged with the basic responsibility of maintaining a merit system of employment in the federal service.[16] Because of their experience with the requirements of the federal merit system of employment, the Commission and other responsible federal personnel officials are peculiarly qualified [17] to evaluate complaints of employment discrimination in light of those requirements and to adjudicate discrimination complaints in a way that is compatible, rather than in conflict, with the more pervasively non-discriminatory maintenance of the merit system of federal employment.

Thus, whatever the perceived imperfections in Civil Service Commission procedures,[18] Congress deliber-

[16] As Senator Pendleton stated, in sponsoring the original civil service law (sometimes referred to as the Pendleton Act):

> The single, simple, fundamental, pivotal idea of the whole bill is, that whenever, hereafter, a new appointment or a promotion shall be made in the subordinate civil service in the departments or larger offices, such appointment or promotion shall be given to the man who is best fitted.

S. Rep. No. 576, 47th Cong., 2d Sess. X (1882) (statement of Senator Pendleton).

[17] During the first half of Fiscal Year 1976, for example, the Commission's 102 complaints examiners conducted EEO complaint hearings in 926 cases, or 24.7% of their total docket of 3750 hearings. In Fiscal Year 1975, 1216 (20.8%) of the examiners' 5846 hearings were devoted to EEO complaints.

[18] In a portion of his analysis of the legislative history in *Hackley* v. *Roudebush*, *supra*, not joined by the other members

ately determined to maintain federal EEO jurisdiction within the agencies and the Commission and, through improved administrative proceedings, to continue the "primary responsibility" [19] of the Executive Branch to assure non-discrimination in employment. Absent a showing of procedural unfairness, legal error, or inadequate evidentiary support, judicial deference to the results of these administrative proceedings would best comport with this legislative determination.

3. Petitioner (Br. 30, 38–39, 45), like those courts that have held federal employees entitled to a judicial trial *de novo,* relies heavily on the following statement from the Senate Committee Report:

> An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision.

of the panel, Judge Wright, minimized the improvement in Commission procedures since the enactment of the 1972 Amendments. 520 F. 2d at 137–141. Obviously, however, Civil Service Commission conduct subsequent to 1972 is not relevant to an assessment of the intent of Congress in passing the federal amendments. Moreover, as we explain *infra*, pp. 56–63, we disagree with Judge Wright's conclusion as to the adequacy of current Civil Service Commission procedures.

[19] Section 717(e) of the Act provides:

"Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government."

> The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the committee enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. *Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII.*

S. Rep. No. 92–415, *supra,* at 16; Legislative History at 425 (emphasis added). We have previously shown (see *supra,* pp. 30–34) that the initial portion of this excerpt indicates a legislative intent behind the federal employee provisions of the 1972 Amendments that in no way requires *de novo* judicial review. The last sentence, however, has been interpreted by three courts of appeals to mean that Congress contemplated *de novo* review for federal employees, since private sector suits were then and are now trials *de novo* and the federal employee provisions as finally enacted are essentially identical to those referred to in the Senate Committee Report.[20]

[20] See, *e.g.*, *Hackley* v. *Roudebush*, *supra*, 520 F. 2d at 143–144; *Caro* v. *Schultz*, *supra*, 521 F. 2d at 1087–1088; *Sperling* v. *United States*, *supra*, 515 F. 2d at 471, 480–481.

With deference, we submit that that reading of the sentence improperly ignores the provisions of the specific bill to which the report was addressed, and is erroneous. While the federal employment provisions ultimately signed into law are indeed essentially the same as those discussed in the report, the private sector provisions of the Senate Committee Bill that was the subject of the report differed significantly from those either then in existence or ultimately enacted. Therefore, in order to determine the intent reflected in the statement in the Senate Committee Report equating federal and private enforcement procedures under the proposed bill, the system of judicial review proposed for private employees in the Senate Committee Bill must be examined.

As we have noted, *supra,* p. 28, the Senate Committee Bill proposed to give the EEOC cease and desist authority in the private sector. Following the filing of a charge of employment discrimination, the EEOC would undertake an investigation. If it found reasonable cause to believe that the charge was true, it would endeavor by "conference, conciliation, and persuasion" to eliminate the practice (S. 2515, *supra,* at 34–35; Legislative History at 377–378). If those efforts were unsuccessful, the EEOC would issue a complaint to the employer, and a full administrative hearing, with testimony taken under oath and transcribed verbatim, would follow (S. 2515, *supra,* at 38–39; Legislative History at 381–382). The EEOC would then state its findings of fact and either dismiss the

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complaint or issue a cease and desist order to the employer, which order could include provisions for reinstatement with back pay (S. 2515, *supra,* at 39–40; Legislative History at 382–383). Either action by the EEOC would be reviewable only by a United States court of appeals *to determine whether substantial evidence supported the EEOC decision* (S. 2515, *supra,* at 41–45; Legislative History at 384–388).

The bill also provided for a civil action in the district court in certain limited circumstances (S. 2515, *supra,* at 47–50; Legislative History at 390–393). In the absence of a conciliation agreement to which the aggrieved person was a party, a private sector employee could bring a civil action (1) if the EEOC dismissed his charge for lack of reasonable cause, (2) if 180 days after filing the charge with the EEOC, the Commission had issued no complaint (this right ended after 60 days or once the EEOC issued a complaint, but if suit was filed under this provision, the EEOC was precluded from further action), or (3) if 180 days after issuing a complaint the EEOC had made no decision and issued no order (this right ended once the EEOC issued an order).[21] With regard to the last provision, the bill provided that a district court could stay an action brought during the period from 180 days to one year after the issuance of the complaint——

[21] A civil action in the district court was also permitted under the Senate Committee Bill if the EEOC entered into a post-complaint agreement with the employer to which the aggrieved person was not a party.

> upon a showing that the Commission has been acting with due diligence on the complaint, that the Commission anticipates the issuance of an order * * * within a reasonable period of time, that the case is exceptional, and that extension of the Commission's jurisdiction is warranted.

S. 2515, *supra,* at 50; Legislative History at 393.

The obvious purpose of these provisions was to give an aggrieved employee a plenary, *de novo* judicial remedy only in the event that he had been unable to obtain a timely EEOC order based upon an administrative hearing; under the bill, a civil action could not be instituted in the district court if the complainant had previously obtained an administrative order, either satisfactory or adverse, based upon a hearing record. Substantial evidence review in the court of appeals on the basis of that administrative record would then be the exclusive remedy. Nor was this result inadvertent—the Senate Committee Report clearly explained that the bill was intentionally drafted to preclude an employee from retrying his case in the district court after losing at the administrative level:

> The committee is concerned, however, about the interplay between the newly created enforcement powers of the [EEO] Commission and the existing right of private action. It concluded that duplication of proceedings should be avoided. The bill therefore contains a provision for cutoff of the Commission's jurisdiction once the private action has been filed—except for the power to intervene—as well as a cutoff

> of the right of private action once the Commission issues a complaint or enters into a conciliation or settlement agreement which is satisfactory to the Commission and the aggrieved party.
>
> * * * * *
>
> It should be noted, however, that it is not the intention of the committee to permit an aggrieved party to retry his case merely because he is dissatisfied with the Commission's action. Once the Commission has issued an order, further proceedings must be in the courts of appeals * * *.

S. Rep. No. 92–415, *supra,* at 24; Legislative History at 433.

The district court civil action authorized in limited circumstances by the Senate Committee Bill was a trial *de novo,* but not because of anything provided in Section 706 (see *supra,* pp. 20–21). Rather, precisely because such actions could be brought only when there was no prior administrative hearing record to review, a trial *de novo* was a necessity. Once an administrative record had been compiled, however, court review was to be confined to a determination of whether the administrative findings were supported by the evidence adduced. When viewed in context, therefore, the statement in the Senate Committee Report that "[a]ggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII" (S. Rep. No. 92–415, *supra,* at 16; Legislative History at 425) indicates not an absolute right to a trial *de*

novo but, to the contrary, that a *de novo* judicial proceeding in federal employment cases is appropriate only in the absence of an administrative hearing record, and that otherwise a more restricted scope of judicial review was envisioned. See *Pointer* v. *Sampson,* 62 F.R.D. 689, 693 (D. D.C.)

The conclusion that Congress intended federal antidiscrimination remedies roughly to parallel these private sector judicial review provisions under the Senate Committee Bill follows not only from this explicit legislative history but also from the structure of the 1972 Amendments as finally enacted. Thus, in addition to the civil action permitted after final agency or Civil Service Commission review, a federal employee may bring a civil action (1) if 180 days after filing a charge with the appropriate agency there has been no final agency action (this right ends once the agency acts) and (2) if 180 days after filing an appeal to the Civil Service Commission the Commission has made no decision (this right ends once the Civil Service Commission decides). The parallel is emphasized by the Section-by-Section Analysis in the Senate Committee Report:

> The provisions of sections 706(q) through (w) concerning private civil actions by aggrieved persons are made applicable to aggrieved Federal employees or applicants. They could file a civil action within 30 days of notice of final action on a complaint made pursuant to section 717(b), or after 180 days from the filing of an initial charge, or an appeal with the [Civil Service] Commission. The authority given to

> the [Equal Employment Opportunity] Commission or the limitations placed upon the Commission under sections 706(q) through (w) would apply to the Civil Service Commission or the agencies, as appropriate, in connection with a civil action brought under section 717(c). So, for example, if the Civil Service Commission or agency does not issue an order within 180 days after a complaint or appeal is filed, the aggrieved person may also institute a civil action. If such action is instituted within one year of the filing of the complaint or appeal, the Civil Service Commission or agency may request that the action be stayed or dismissed upon a showing that it has been acting with due diligence, that it anticipates issuance of an order within a reasonable time on the complaint or appeal, that the case or proceeding is exceptional and that extension of *exclusive jurisdiction of the Civil Service Commission or agency* is warranted.

S. Rep. No. 92–415, *supra,* at 45–46; Legislative History at 454–455 (emphasis added).[22] There obviously would be little point to extending the agency's or the Civil Service Commission's jurisdiction for an additional 180 days if Congress had contemplated a *de novo* proceeding in the district court even after a final agency or Commission decision. On the contrary, the reference to "exclusive jurisdiction of the Civil

[22] On February 15, 1972, following the amendment of the Senate Committee Bill to eliminate EEOC cease and desist powers and to place all private sector enforcement in the district courts, Section 706(q) was eliminated as unnecessary, the renumbering of Sections 706(f) through (k) as Sections 706(r) through (w) was deleted, and the federal employment provision incorporating

Service Commission or agency" strongly indicates that review, rather than retrial, of timely agency or Commission determinations was contemplated.[23]

Sections 706(q) through (w) was changed to incorporate Sections 706(f) through (k). 118 Cong. Rec. 3980; Legislative History at 1562. This technical amendment removed the private sector provision permitting the EEOC to seek additional time from the district court in which to issue an order—a provision that was of course no longer necessary in view of the removal of EEOC authority to issue orders. The amendment, however, inadvertently also removed express stay authority from federal agencies and the Civil Service Commission, which continued to retain power to issue orders. Nevertheless, just prior to passage of the Senate bill, Senator Williams submitted a Section-by-Section Analysis which reiterated that the Civil Service Commission or an agency could seek to stay a district court action filed after the elapse of 180 days. 118 Cong. Rec. 4943–4944 (1972) Nothing in the statute as enacted would bar the Commission or an agency from seeking such a stay. Even if it is assumed, however, that the Civil Service Commission or an agency would not now be permitted to stay a district court action, the above-quoted excerpt demonstrates that Sections 717(c) and (d) were intended to incorporate into federal employment suits the dual characteristics of private sector court actions found in the Senate Committee Bill: trial *de novo* in the absence of an administrative order issued after opportunity for a hearing, or substantial evidence review following such an order.

[23] The District of Columbia Circuit, in *Hackley* v. *Roudebush*, *supra*, relied on certain statements by Senator Dominick which it read to imply that private sector employee rights under the Senate Committee Bill contrasted with, rather than paralleled, the rights given to federal employees by the bill. 520 F. 2d at 130–131 and n. 85. Arguing against EEOC cease and desist authority, Senator Dominick had indicated that the provisions of the Senate Committee Bill for such authority in the private sector were not comparable to the court enforcement procedures to be available to federal employees. See, *e.g.*, 118 Cong. Rec. 595, 697, 3389 (1972); Legislative History at 683, 693, 1441. Each of these statements

This result is also required by the analysis of the Senate bill submitted by Senator Williams *after* the Senate had agreed to an amendment removing EEOC cease and desist authority and placing all private sector enforcement actions in the district court without an administrative hearing. This analysis relied heavily on the language of the earlier Senate Committee Report but, significantly, *changed* the crucial wording discussed above (now erroneous because of the private sector amendment) to make clear that *review* of the

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was generally phrased and none specifically indicated the scope of review in federal employee actions; all were addressed to a separate and distinct issue. Senator Dominick's extemporaneous comments are therefore not authoritative on the question presented here and should not be accorded the weight of explanatory remarks. Indeed, it would be improper to do so, since he was speaking in opposition to the bill reported out by the Committee, and no sponsor of that bill or spokesman for the Committee majority reporting it out expressed agreement with his characterizations of its effects. Moreover, the lack of authoritativeness of his remarks is shown by the fact that at least twice during the debate he erroneously attributed some aspect of the assertion of federal employee court rights to the Attorney General. See 118 Cong. Rec. 3389, 3809 (1972) : Legislative History at 1440, 1482. At most, therefore, Senator Dominick's statements add an element of ambiguity to the floor debates for present purposes. More probative evidence in the legislative history, discussed in the text above, indicates that federal employees, like private sector employees under the Senate Committee Bill, were entitled only to judicial review on the administrative record when the agency or Civil Service Commission had made a determination based upon an administrative hearing record.

agency record in federal employee cases was still contemplated: [24]

> An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private *right of action of review of the agency proceedings* in the courts by Federal employees who are not satisfied with the Agency or Commission decision.
>
> * * * The provisions adopted by the Committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. Aggrieved employees or applicants will also have the full *rights of review* available in the courts.

118 Cong. Rec. 4923 (1972) ; Legislative History at 1730 (emphasis added). Senator Williams' oral remarks at the time he presented this analysis are fully consistent with the same conclusion—that where there has been a final agency or Civil Service Commission determination, reached after the opportunity for an administra-

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[24] For a side-by-side comparison of the two statements, see *Sperling* v. *United States*, *supra*, 515 F. 2d at 480, n. 71 (Pet. App. 70a-71a). The *Sperling* court noted the changes in wording and gave greater credence to the Senate Committee Report, without recognizing that the Committee Report referred to private sector rights that were significantly different from those provided by the bill at the time of Senator Williams' analysis.

tive hearing, a review of the administrative record rather than a trial *de novo* was intended:

> Finally, written expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U.S. District Court for *a review of the administrative proceeding record after a final order by his agency or by the Civil Service Commission,* if he is dissatisfied with that decision.

118 Cong. Rec. 4922 (1972); Legislative History at 1727 (emphasis added).

Although the Senate Committee Report and these statements of Senator Williams, the floor manager of the bill, strongly suggest that Congress did not anticipate that federal employees would be entitled to a trial *de novo* in every instance, the only statement directly addressing the scope of review is that of Senator Cranston, who referred to the federal employment provisions of the Senate bill as "my amendment." 118 Cong. Rec. 4929, 4931 (1972); Legislative History at 1744, 1749. The Congressional Record recorded Senator Cranston as stating on the day that the bill passed the Senate:

> For the first time, [my Federal EEO amendment would] permit Federal employees to sue the Federal Government in discrimination cases—under the theory of Federal sovereign immunity, courts have not generally allowed such suits—and to bring suit either prior to or after CSC review of the agency EEO decision in the case. As with other cases brought under Title VII of the Civil Rights Act of 1964, Federal district court review would be based on the agency and/or CSC record and would not be a trial de novo.

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118 Cong. Rec. ~~4920~~ (1972); Legislative History at 1744. Almost a year after the debate and ten months after the 1972 Amendments had been enacted, Senator Cranston announced that "the word 'not' was misplaced" in the Congressional Record, and that when "set forth * * * in the correct manner" his statement would read "review would not be based on the agency and/or CSC record and would be a trial de novo." 119 Cong. Rec. S1219 (daily ed. Jan. 23, 1973). We submit that Senator Cranston's statement as belatedly corrected is of little probative value in determining congressional intent. As the Eighth Circuit noted:

> While Senator Cranston has clarified his personal intent, we cannot ignore the fact that during the two months following the initial statement while the Act went through Conference Committee and was finally approved, the official journal of Congress contained his explicit and authoritative interpretation rejecting any automatic requirement of a *de novo* trial. In considering the intent of Congress, we cannot rule out the possibility, if not the probability, that Senator Cranston's remarks as initially reported, especially when read with the comments of Senator Williams, were relied upon by many congressmen.

Haire v. *Callaway, supra,* slip op. 6 n. 4.

The legislative history of the 1972 Amendments to

Title VII, then, if viewed as a whole and with an appreciation of the context at each stage of the debate, manifests an intent to require review, not retrial, of agency and Civil Service Commission equal employment opportunity determinations that are based on an administrative record following the opportunity for a hearing. While not unambiguous on every facet of the federal employee provisions, this history at the very least refutes petitioner's contention that Congress clearly intended to mandate judicial trials *de novo* in all Title VII cases.

C. THE STATUTORY SCHEME IS BEST PROMOTED BY CONFINING JUDICIAL REVIEW IN ORDINARY CASES TO THE ADMINISTRATIVE RECORD

Although the legislative history outlined above indicates that court review of an administrative record was contemplated by Congress, neither it nor the language of the statute unequivocally sets forth the scope of review to be applied by the district court in federal employment discrimination cases. Absent such clear guidance, this Court has repeatedly indicated that "*de novo* review is generally not to be presumed." *Consolo* v. *Federal Maritime Commission, supra,* 383 U.S. at 619, n. 17; *United States* v. *Carlo Bianchi & Co., Inc., supra,* 373 U.S. at 715.

In private sector Title VII actions, the Court has held this presumption against *de novo* review inapplicable, basically because of the limited nature of the EEOC administrative investigation or the union grievance-arbitration proceedings conducted prior to the

institution of the civil suit—neither of which was intended, or purports, to be an administrative determination of the Title VII claim. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792; *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36. Federal employees are, by contrast, afforded an effective administrative remedy for their Title VII complaints under an elaborate and fair procedure, established by an integrated set of regulations, that is designed specifically to adduce the salient facts and to compile a full evidentiary record for administrative determination and, ultimately, judicial review.

Given this administrative remedy, under a procedure inherently adequate to protect the employee's rights, routine trials *de novo* would tend to defeat, rather than advance, the purposes of the statutory scheme. Such duplicative proceedings would conflict with the congressional directive that employment discrimination disputes be settled expeditiously, would undermine the integrity of the administrative process and retard its evolutionary improvement, and would add unnecessary expense and delay for all concerned. Moreover, little systemic benefit would be gained by *de novo* proceedings, since the employee's rights are fully protected by a fair and complete administrative hearing, resulting in findings of fact and an administrative determination that is subject to prompt judicial review.

1. In *McDonnell Douglas Corp.* v. *Green, supra,* this Court held that in private sector Title VII actions an

EEOC finding of reasonable cause is not a jurisdictional prerequisite to suit and that a finding of no reasonable cause is not a bar to suit. 411 U.S. at 798–799. The Court further recognized that the court action following EEOC consideration must necessarily be a *de novo* proceeding. But, as we have stated, this result was not based upon a determination that the Act itself requires the district court always to proceed *de novo*. Rather, the result was founded upon a realistic appraisal of the function and limitations of the agency proceedings prior to suit. The Court specifically referred to "the large volume of complaints before the [EEOC] and the nonadversary character of many of its proceedings." 411 U.S. at 799. Furthermore, the Court cited with approval the decisions of several lower courts that had summarized in greater detail the limited nature of EEOC powers and procedures.[25] For example, the Fifth Circuit had noted that the EEOC

> is neither required nor physically able to conduct an "in depth" investigation in every case; apparently the investigative procedure, in the instant case was performed on an ex parte basis, bereft of all the advantages which come from an adversary proceeding in a court of law. The [EEO] Commission possesses no power of enforcement; it cannot fix a penalty, issue a citation, or grant a cease and desist order.

Beverly v. *Lone Star Lead Construction Corp., supra,* 437 F. 2d at 1141 (footnote omitted).[26]

Similarly, in *Alexander* v. *Gardner-Denver Co., supra,* this Court held that the district court in a Title VII suit should not defer to findings concerning employer discrimination reached in a grievance arbitration award under a collective bargaining agreement. The primary determinant in *Alexander* was the important difference between rights under a labor-management contract (and their enforcement in an arbitration award) and the rights accorded by Title VII. 415 U.S. at 52–54, 57. The Court pointed out that an arbitrator's job is to give effect to the contractual intent of the parties—"the law of the shop"—rather than to the requirements of the Civil Rights Act—"the law of the land," 415 U.S. at 57—and that the parties' contractual intent, or the union's enforcement of it, may subordinate the interests of an individual employee to the collective interests of the bargaining unit, 415 U.S. at 58, n. 19. Accordingly, a policy of judicial deference in Title VII cases to the largely unreviewable awards of arbitrators under collective bargaining agreements would leave the employee with-

[25] *Robinson* v. *Lorillard* Corp., 444 F. 2d 791, 800 (C.A. 4); *Beverly* v. *Lone Star Lead Construction Corp.*, 437 F. 2d 1136 (C.A. 5); *Flowers* v. *Local No. 6, Laborers International Union of North America*, 431 F. 2d 205 (C.A. 7); *Fekete* v. *U.S. Steel Corp.*, 424 F. 2d 331 (C.A. 3).

[26] Indeed, the fact that Congress did not intend EEOC proceedings to result in a record suitable for adjudication of a Title VII complaint is reflected in the restrictions in Section 706(b), 42 U.S.C. (Supp. IV) 2000e–5(b) on the use in court or the making public of anything "said or done during and as a part of" EEOC's conciliation efforts.

out a determination of his statutory claim by either court or arbitrator.[27]

Thus, in both *McDonnell Douglas* and *Alexander* the proceedings conducted prior to the filing in court of the Title VII suit did not constitute, or purport to be, an administrative determination of the Title VII claim and were not designed to produce a record suitable for adjudication of the Title VII claim. Accordingly, this Court held that the Title VII suit in such instances necessarily must proceed as a trial *de novo*. But the Court in those cases in no way addressed the question of the proper scope of judicial review of an administrative proceeding whose whole purpose was to determine the Title VII claim, and which has indeed resulted in an administrative determination of that claim. Much less did this Court hold that, with respect to such an administrative determination, *any* distinction between agency and district court procedures, regardless of the inconsequence of those differences upon Title VII enforcement, would require a trial *de novo*. To the contrary, it is normally the case that judicial review, involving issues as fundamental to the individual as those involved here, is confined to a record that has not been compiled in a manner identical to court proceedings. See, *e.g.*, *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182 (suspension of license

[27] The Court also noted several respects in which the informal arbitration proceeding was unsuited for the resolution of Title VII issues—in particular, the unavailability in most cases of a complete record, discovery, compulsory process, cross-examination or testimony under oath, and the lack of any obligation by arbitrators to give reasons for their awards. 415 U.S. at 57–58.

to operate stockyard); *Fein* v. *Selective Service System Local Board No. 7*, 405 U.S. 365 (induction into Armed Forces); *Richardson* v. *Perales*, 402 U.S. 389 (disability insurance benefits); *Goldberg* v. *Kelly*, 397 U.S. 254 (welfare payments); *W.E.B. DuBois Clubs of America* v. *Clark*, 389 U.S. 309 (registration requirement for political organization).

The administrative process rarely includes all the characteristics of district court trials—for example, formal rules of evidence generally do not apply, see 5 U.S.C. 556(d); *Richardson* v. *Perales, supra*, 402 U.S. at 400, 409—yet there is no inherent unfairness in the absence of such requirements.[28] See, *e.g.*, 402 U.S. at 402–406. The crucial question in each instance is whether the fact-finding mechanism that precedes court review is structurally incapable of building an adequate record or awarding effective relief.

2. Because the systemic defects found in *McDonnell Douglas* and *Alexander* are present in *every* EEOC and arbitral proceeding, the Court held that the Title VII complainant in those circumstances has an unconditional right to a trial *de novo*, without inquiry into whether the administrative or arbitral record compiled for other purposes in his case could adequately serve

[28] Indeed, relaxed enforcement of evidentiary rules by a Title VII complaints examiner benefits the employee, since a complainant (such as petitioner) who elects not to retain counsel may present his own case, with the assistance of the examiner and the investigative file, without regard to technical legal rules that might inhibit the search for the truth.

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as a basis for determining his Title VII claim.[29] In light of the significantly different nature of the administrative proceedings conducted to determine federal employment discrimination complaints, however, imposition of such an unyielding rule to judicial review of those Title VII determinations would be inappropriate. While there are, of course, differences between judicial proceedings and administrative enforcement actions supervised by the Civil Service Commission, the procedures prescribed by the Commission normally are fully capable of compiling a thorough record that can serve as the proper basis for judicial review, without sacrifice of legitimate Title VII interests.

The regulations promulgated by the Civil Service Commission pursuant to Section 717 of the Act provide that a federal employee who believes that he has been discriminated against on the basis of race, color, religion, sex, or national origin must communicate with an Equal Employment Opportunity Counselor of his agency in an effort to secure informal resolution,[30] and must receive a prompt and thorough in-

[29] The Court held in *Alexander*, however, that the arbitral decision is admissible in the Title VII suit and may be accorded such evidentiary weight as the district court deems appropriate. 415 U.S. at 60, n. 21.

[30] The employee must act within 30 days of the occurrence of the alleged discriminatory practice. Upon a showing by the employee of an adequate reason for failing to comply with the 30-day rule, the time limits will be extended. 5 C.F.R. 713.214(a)(4). Although *amicus* objects to this time limitation as unreasonable (Br. 29, 18a), it is no more stringent than the 30-day limitation on filing suit imposed by Section 717(c) of the Act, which has

vestigation following the filing of a formal discrimination complaint if conciliation of his grievance cannot be achieved within 21 days.[31] 5 C.F.R. 713.213–713.216. After the complainant has reviewed the completed investigatory file (which may contain statements under oath), the agency must again provide an opportunity for informal adjustment of the complaint and, if this is not successful, must advise the complainant of his right to a formal hearing. 5 C.F.R. 713.217.

At the hearing a complainant is accorded a full panoply of procedural rights. The hearing must be conducted by a complaints examiner certified as qualified by the Civil Service Commission. Except in nar-

been strictly enforced by the courts. See, *e.g.*, *Brown* v. *General Services Administration*, 507 F.2d 1300 (C.A. 2), pending on writ of certiorari, No. 74–768; *Carter* v. *Lynn*, 401 F. Supp. 1383 (D. D.C.); *Fuqua* v. *Robinson*, 398 F. Supp. 681 (D. N.J.).

[31] *Amicus* (Br. 14a–15a) criticizes this requirement of precomplaint counseling, contending that the failure of an employee to file a formal complaint after the counseling must indicate that a counselor, in violation of regulations, has discouraged him from doing so. This argument presupposes that every employee who seeks counseling must have been a victim of discrimination. The fact is that many of the complaints are nothing more than ordinary employee grievances and misunderstandings which can and should be resolved in an informal manner. In Fiscal Years 1972–1974, for example, EEO Counselors were able to obtain 30,491 corrective actions. (Of course, more than one corrective action may be achieved in a single case.) Furthermore, the availability of these informal procedures encourages employees to come forward with their complaints in a conciliatory setting, without being cast at the outset into an adversary role with their superiors. Indeed, the regulations expressly provide that the counselor may not reveal the identity of the employee during precomplaint processing unless authorized to do so by the employee. 5 C.F.R. 713.213(a).

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row circumstances, the examiner must be an employee of a different agency.[32] C.F.R. 713.218(a). The examiner initially reviews the complete investigative file and may order a supplemental investigation before the hearing if he feels it necessary. 5 C.F.R. 713.218(b). At the hearing, as throughout the entire administrative process, the complainant has the right to be accompanied, represented, and advised by a representative of his own choosing.[33] 5 C.F.R. 713.214(b). Moreover, the employee must be given ample opportunity to elicit all "[i]nformation having a bearing on the complaint or employment policy or practices relevant to the complaint * * *," and all testimony must be under oath or by affirmation. 5 C.F.R. 713.218(c)(2). The complainant may request the examiner to arrange for the presence as a witness of any federal employee who is likely to give pertinent testimony. 5 C.F.R. 713.218 (e). The complainant has the right to cross-examine witnesses. 5 C.F.R. 713.218(c)(2). The hearing must be recorded and transcribed verbatim, and all documents submitted become part of the record. 5 C.F.R. 713.218(f).

[32] The complaints examiner need not be an employee of another agency only when the agency in which the complaint arose is "(1) the government of the District of Columbia, or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency." In these circumstances the agency must "arrange with the [Civil Service] Commission for the selection of an impartial employee of the agency to serve as complaints examiner." 5 C.F.R. 713.218(a).

[33] Despite this provision, petitioner (Br. 61–62) and *amicus* (Br. 26–27) allege that a prime deficiency of the administrative proceedings is the failure to provide an attorney for the complainant or for attorney's fees if he prevails. The factual premise of these contentions is erroneous, since employees in administrative proceedings often have available the services of an attorney without charge. The Commission's regulations expressly state that lawyers in the complainant's agency may be allowed a reasonable amount of time away from their official responsibilities for the purpose of representing an aggrieved employee without fee (5 C.F.R. 713.214(b)) and certain agencies, such as the Department of Justice, operate an EEO Volunteer Representatives Program to assist Department employees in administrative proceedings. Indeed, the Attorney General has authorized Justice Department attorneys to represent employees in other federal agencies without compensation. The District of Columbia Bar Association, which serves the area of greatest concentration of government workers, also operates an Employment Discrimination Complaint Service, which refers federal employees to private and governmental lawyers who have agreed to provide free legal representation in discrimination cases.

In any event, appointment of an attorney for the complainant in Title VII court actions is discretionary under the statute, not absolute. Moreover, payment of attorney's fees relates only to a fringe benefit, not to a substantive or procedural defect of the administrative fact-finding process that would prevent the equitable resolution of an employee grievance. It is settled that the failure to provide paid attorneys does not render proceedings unfair. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 270, n. 46 (attorney's fees not awardable in civil rights actions brought under the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981). Congress could reasonably have determined that an award of attorney's fees to a successful complainant often is necessary in expensive and time consuming judicial proceedings, but not in administrative proceedings where, under the Commission's procedures, both the pre-hearing investigator (5 C.F.R. 713.216(a)) and the complaints examiner (5 C.F.R. 713.218(c)(2)) are under an independent obligation to develop the facts.

At the conclusion of the hearing, the examiner prepares a complete file, which must consist of the report of the EEO Counselor, the complaint, the investigative file, the record of the hearing, and the examiner's

findings of fact, proposed decision, analysis and (where appropriate) recommended remedy. 5 C.F.R. 713.218 (g). This record is then transmitted to the head of the agency or his designee, whose decision—required to be in writing—must be based thereon and must be sent to the complainant, together with a copy of the examiner's findings and the hearing record. 5 C.F.R. 713.221. If the agency rejects or modifies the examiner's recommendation, a specific statement of reasons must be provided.[34] If on the other hand the agency decides that discrimination has been proven, it may award such relief as retroactive promotion and back pay. 5 C.F.R. 713.271. Following final agency action, the complainant must be notified of his right to file a civil action or to appeal to the Civil Service Commission (and then, if unsuccessful, to file a civil action). 5 C.F.R. 713.281. Appeals are considered by the Commission's Appeals Review Board which, after reviewing the complaint file and all other relevant written representations made to it, must issue a written decision that may affirm or reverse the agency, remand to the agency for further investigation or fact-findings or for a rehearing, or order additional investigation to be conducted by Commission personnel.[35] 5 C.F.R. 713.234.

[34] Contrary to *amicus*' assertion (Br. 32a, n. 43), the Appeals Review Board has on occasion remanded cases to the agency for failure to specify the reasons for rejecting the complaints examiner's decision. See, *e.g.*, Appeals Review Board No. RB071350729 (June 30, 1975).

[35] In Fiscal Year 1975, 749 appeals of agency EEO decisions were decided by the Board. The Board affirmed the agency in 564

These administrative proceedings, while not the precise equivalent of district court trials, do not suffer the severe procedural or substantive limitations found in EEOC investigative processes or labor union arbitrations, and offer non-judicial remedies unparalleled in the private sector. Unlike EEOC proceedings, the federal employee has the right to a full hearing before an impartial examiner, at which he may be represented by counsel and may call and cross-examine witnesses, and where testimony is transcribed and taken under oath; also in contrast with EEOC proceedings, at the termination of the hearing adjudicative findings are made and a statement of the reasons for the decision is provided either by the complaints examiner or by the head of the agency. A full administrative record is created by the investigation and the subsequent hearing, and the agency has the power to afford complete relief.

cases (75%), reversed in 74 cases (10%), and remanded to the agency in 111 cases (15%). These statistics hardly indicate that the administrative appeal process is futile. By contrast, in 1974 the courts of appeals reversed the judgment in only 18.6 percent of their cases. Annual Report of the Director of the Administrative Office of the United States Courts, 1974, p. IX–12.

All decisions of the Appeals Review Board since July 1, 1974, are available to the general public at Civil Service Commission headquarters and at each of the Commission's ten regional offices. The Commission also distributes a quarterly *Index to Appeals Decisions*, which categorizes every Board decision and the reasons for the action taken, and a monthly *Digest of Significant Decisions*, which summarizes the noteworthy appeals. The *Digest* is mailed on a regular basis to any interested individual or organization.

Furthermore, contrary to *amicus'* attempt to portray agency and Civil Service Commission proceedings as suffering the same defects as labor union arbitrations (Br. 20–25), the Commission and federal agencies (unlike arbitrators) must follow the substantive law of Title VII in reaching their decisions. The assertion that in many instances they are in error as to that law does not change their responsibilities or the nature of the law they are bound to apply.[36] Such errors of law—which we can assume will diminish as Title VII is explicated by the courts and as administrative responsibility is secured—can be corrected by court review of the administrative decision on the administrative record as readily as (or, indeed, more readily than) by trial *de novo*.[37] See, *e.g.*, *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, 318; *National Labor Relations Board* v. *Brown*, 380 U.S. 278, 292. While such judicial review of arbitral awards would be incompatible with

[36] See *Morton* v. *Mancari*, 417 U.S. 535, 547, noting that "[i]n general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government." *Morton* concerned whether certain federal employment preferences for Indians survived the enactment of Title VII and its extension in 1972 to federal employees. Although frequently cited by petitioner, *Morton* indicates only that the *substantive* private sector Title VII law was carried over to the federal government, not that the federal and private sector procedural formats for enforcing Title VII must be identical. This Court referred only to the 1972 Amendments' "extending the *general* anti-discrimination machinery to federal employment." 417 U.S. at 548 (emphasis added).

[37] See, *e.g.*, *Day* v. *Weinberger*, 8 EPD ¶ 9771 (D. D.C.), pending on appeal, C.A.D.C., No. 75–1085, in which the district court,

the utility of informal arbitration procedure "as an efficient, inexpensive, and expeditious means for dispute resolution" (*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 58), it would serve to strengthen the administrative procedures for adjudication of federal Title VII claims (see pp. 67–68, *infra*).

without holding a trial *de novo*, rejected the agency's legal premise that back pay could not be awarded without a finding that the complainant would have been promoted absent the discrimination. (On appeal the government has contended not that federal employees must make a greater showing than private employees in order to receive back pay, but that, as in the private sector, employees are entitled to back pay only when they would have been promoted or hired but for the prohibited discrimination. 5 C.F.R. 713.271 (b)(1). See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (opinion of the Court), 440 (Marshall, J., concurring), 445 (Rehnquist, J., concurring).) Similarly, any error in applying the proper burden of proof may be remedied by the reviewing court. Contrary to *amicus'* contention (Br. 21–23), present administrative rules involving the burden of showing discrimination favor the complainant. Unlike the situation in court, the agency may not move to dismiss an administrative proceeding because of the employee's failure to make out a *prima facie* case. The employee's only burden is to file an administrative complaint and to furnish any information available to him. This filing sets into motion the entire investigative hearing mechanism, which cannot be terminated before the agency has responded to the charges of discrimination and produced all relevant evidence within its possession. The complaints examiner is then obliged to "evaluate the evidence contained in the investigative file and in the transcript of the hearing in the light of the agency's responsibility under the Act and the Executive Order," Office of Federal Equal Employment Opportunity *Discrimination Complaints Examiners Handbook* 56–57 (1973), and must require the agency to produce evidence rebutting a finding of discrimination whenever it appears that there has been disparate treatment based on race, color, religion, sex, or national origin. If the agency cannot persuade the examiner that it acted for a non-discriminatory reason, the examiner is required to find for the complainant. *Id.* at 62.

Federal Title VII administrative proceedings also differ significantly from arbitrations by permitting cross-examination, by requiring testimony under oath and decisions based on written findings of fact, and by allowing the complainant (and not another party such as the union, which may have adverse interests) to control the presentation of his case.[38] See *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 58, n. 19. Administrative hearings under the Civil Service Commission's Equal Opportunity Regulations thus are not hindered by the limitations of scope that make arbitral proceedings ineffective as a possible forum for the resolution of Title VII rights.

Although petitioner and *amicus* allege numerous deficiencies in the Commission's procedures, the short answer to these contentions is that if these alleged deficiencies in fact exist and produce an unfair result in a given case, the courts have full power to reverse the administrative decision and to require adjustment and correction of the improper practice.[39] See 5 U.S.C.

[38] In another effort to analogize federal Title VII proceedings to the arbitration involved in *Alexander*, *amicus* contends that the agency, not the complainant, controls the administrative process (Br. 27–29). Obviously in any such proceeding the agency will "control" in the sense that there will normally be no judicial involvement during the course of the administrative process. This Court's concern in *Alexander*, however, was that the union had "control over the manner and extent to which an individual grievance is presented." 415 U.S. at 58, n. 19. At the administrative hearing provided by Civil Service Commission regulations, the complainant has complete authority over the way his complaint is presented. And again, any error in the conduct of the hearing subjects the decision to reversal by the reviewing court.

[39] For example, if a complainant makes a reasonable request for relevant information in the possession of the agency and the

706(2)(D); *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 339–340. A district court, for example, has recently invalidated Commission rules that effectively prohibited administrative class actions. *Barrett* v. *United States Civil Service Commission,* D. D.C., Civ. No. 74–1694, decided December 10, 1975.[40] In the ordinary case, however, there is no reason why the Commission's procedures are incapable of building a full and fair record, which may be adequately reviewed by a court, and there is no basis for assuming that the complaints examiner, who compiles the record and

request is arbitrarily denied, remand or supplementary judicial proceedings may be necessary. A proper pre-hearing investigation by a disinterested investigator (see 5 C.F.R. 713.216), however, should normally eliminate the need for an employee to request additional information.

[40] The Civil Service Commission has now approved in concept the propriety of administrative class actions, and we expect that draft regulations implementing *Barrett* will be published before the end of February 1976. Even without formal class actions, however, the Commission has considered statistical evidence of discrimination in adjudicating complaints, and possesses the power to remedy systemic or class-wide bias on the administrative level. Present regulations instruct the pre-hearing investigator to compile statistical data on "the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group," 5 C.F.R. 713.216(a), and such data also are collected in conjunction with agency affirmative action programs. 5 C.F.R. 713.302. This evidence has been used on appropriate occasions by complaints examiners, agency heads, and the Commission's Appeals Review Board. See, *e.g.*, *Evans* v. *Lynn,* D. D.C. Civ. No. 630–73, decided October 24, 1974. Nevertheless, the propriety of administrative class actions has no bearing on the precise issue here—whether judicial review should be confined to the administrative record in normal federal Title VII cases. Review may be based on the administrative record whether or not class actions are permitted, especially when a pattern or practice of discrimination in an agency is alleged.

judges demeanor and credibility, will not be impartial. (Here, she ruled in petitioner's favor.) In addition, since employment discrimination cases ordinarily turn on the testimony of members of the affected agency, the examiner's power to compel the testimony of any federal employee should suffice in all but a relatively few, atypical cases of alleged discrimination. 5 C.F.R. 713.218(e).

We recognize that in certain unusual instances the statutory scheme may render the administrative procedures structurally incapable of developing an adequate record. If an essential witness is not a government employee, and he refuses to attend the hearing, there is no subpoena power to require his attendance. In such instances, a supplementary hearing in the district court, or even a trial *de novo*, may be required. Similarly, when an administrative complaint has not been timely processed and the employee brings suit under the 180-day provision of Section 717(c), there may have been no opportunity for an administrative hearing, and hence the courts would not have any administrative record to review. Again, of necessity, a trial *de novo* may be required.[41] But these execptions should not dictate the rule (see S. Rep. No. 92–415, *supra,* at 23; Legislative History at 432), and where, as here, the claimant's rights have not been shortchanged and an exhaustive administrative complaint file exists, a trial *de novo* would be inappropriate. As we have shown, there is no basis, either in

[41] As we discuss *infra*, p. 72, n. 46, in appropriate cases a stay of the judicial proceedings may be proper to permit completion of the agency record.

the structure of the administrative mechanism or in the results produced on the administrative level since 1972, for petitioner's pervasive assumption that no meaningful adjudication of federal Title VII rights can be achieved other than by *de novo* judicial review.

3. The foregoing discussion illustrates that the administrative process can compile a full and fair evidentiary record in the ordinary federal Title VII case. Important policy considerations strongly support a rule confining judicial review in such a case to the administrative record.

As we have previously noted, the 1972 Amendments expressly indicate the intention of Congress that the Civil Service Commission and the agencies have primary responsibility for enforcing nondiscrimination in federal employment. Section 717(a) provides that "[a]ll personnel actions affecting [federal] employees or applicants for employment * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin," and subsection (b) provides that "[e]xcept as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a)." Subsection (e) further provides that "[n]othing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment * * *."

To permit *de novo* proceedings following agency determinations would significantly diminish the important responsibility placed upon the agencies and the Civil Service Commission by statute and would

severely erode efforts to strengthen an administrative process that has been specifically designed to discharge that responsibility. Obviously, a decision maker whose entire fact-finding and deliberative processes may be disregarded or repeated *de novo* often will not be as likely to proceed with the same care as one whose findings are subject to scrutiny, and due deference, on review. Moreover, an absolute right to trial *de novo* in the district court would decrease a complainant's incentive to prosecute his administrative claim vigorously, thus tending to frustrate the congressional determination to retain the agencies and the Civil Service Commission as the key influence in eliminating discrimination in federal employment. And, because an invariable right to trial *de novo* would preclude judicial review and correction of the agency and Commission processes, it would sacrifice the improvement of administrative proceedings that inevitably accompanies penetrating and regular court scrutiny of their fairness, efficacy, and efficiency, and would thus tend to fulfill petitioner's and *amicus'* allegations that such proceedings are inadequate and incapable of enforcing Title VII rights. See Jaffe & Nathanson, *Administrative Law* 31 (3d ed. 1968) ("[j]udicial review, however seldom invoked, casts a long shadow, both before and after it"); Jaffe, *Judicial Control of Administrative Action, supra,* at 189–190.

Review on the administrative record also avoids needless duplication of effort and promotes a prompt resolution of discrimination disputes. A prolonged civil rights employment controversy harms all concerned—not only the complaining employee but also his superiors in the agency charged with discrimination, who must continue to work with each other during the course of the dispute. Judicial review on the administrative record obviously produces a faster and less costly resolution of such disagreements than does the conducting of an essentially duplicative trial *de novo.*

The number of federal Title VII cases is large.[42] Of course, if federal employees had no fair means of enforcing their Title VII rights other than in a plenary judicial trial, the very heavy burden on the federal court system imposed by permitting *de novo* court proceedings in all federal employee cases would not be a significant consideration. But where, as here, aggrieved federal employees are entitled to a complete administrative hearing at which they can present and cross-examine witnesses under oath and on the record, a requirement of *de novo* review would wastefully and unnecessarily burden the district courts.

Courts which have held that federal employees are entitled to a trial *de novo* regardless of the underlying circumstances have attempted to minimize the needless duplication of effort by noting that the district judge may always exclude redundant testimony and may grant summary judgment under Rule 56, Fed. R. Civ. P., in appropriate cases. See, *e.g., Hackley* v.

[42] We cannot state with certainty the precise number of these cases, but the Civil Service Commission participated in the defense of more than 200 federal employee Title VII cases in the district courts in fiscal year 1975 alone. This appears to be a conservative indication of the number of such suits now pending. See also p. 36, n. 17, *supra.*

Roudebush, 520 F. 2d at 157 (opinion of the court) and 171 (Leventhal, J., concurring). While theoretically true, this point ignores the fact that employment discrimination allegations often may involve issues of fact that can be determined only after a personal assessment of the credibility of witnesses. In such cases, as the District of Columbia Circuit has conceded, testimony heard by a complaints examiner and recorded verbatim would have to be retaken. 520 F. 2d at 157 (opinion of the court) and 171 (Leventhal, J., concurring). These suggested remedies would also be unworkable if a witness, called for the first time in the district court proceeding, gives testimony that requires the recall of witnesses who had previously testified at the administrative level.

In judicial review of an adjudicatory administrative determination based upon a hearing, Congress has empowered the courts to set aside agency action that is arbitrary, capricious, or "unsupported by substantial evidence." 5 U.S.C. 706(2).[43] This standard takes account of the expertise and primary responsibility of the agency and, by clearly defining the respective roles of the administrator and judge, prevents duplication of effort, yet it ensures that agency decisions will be supported by the evidence adduced, procedurally correct, and in accordance with the applicable law. Substantial evidence review of the administrative rec-

[43] See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414–415; *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50–51; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 40–41.

ord is a process with which courts are familiar." It is far from a "rubber stamp." *National Labor Relations Board* v. *Brown, supra,* 380 U.S. at 291. Issues of law and procedure are of course reviewable independently, and if the district court cannot find that the evidence supporting the administrative decision is substantial, it must reverse.[45] *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488. Moreover, if the agency or Civil Service Commission has rejected findings of the independent complaints examiner, the court may take this into consideration in determining whether the substantial evidence standard has been met. See *Universal Camera Corp.* v. *National Labor Relations Board, supra,* 340 U.S. at 496–497; *National Labor Relations Board* v. *Universal Camera Corp.,* 190 F. 2d 429, 430 (C.A. 2).

All of these considerations, we submit, lead to the conclusion that judicial review in the ordinary federal

[44] Significantly, when this Court determined in *McDonnell Douglas* and *Alexander* that court proceedings should be *de novo* in the private sector following EEOC investigations or union arbitration awards, the alternative was not substantial evidence review of a hearing record and administrative findings of fact, but rather *deferral* to the previous decision or, indeed, *preclusion* of district court jurisdiction altogether.

[45] *Amicus* (Br. 11–12, n. 10) alleges that no district court applying less than *de novo* review has overturned an administrative decision and granted summary judgment to a plaintiff. This statement is incorrect, See, *e.g.*, *Napper* v. *Schnipke*, 393 F. Supp. 379 (E.D. Mich.); *Robinson* v. *Warner*, 8 EPD ¶ 9452 (D. D.C.); *Day* v. *Weinberger, supra; Davis* v. *Department of Health, Education and Welfare*, 10 EPD ¶ 10,341 (E.D. La.); *Palmer* v. *Rogers*, 10 EPD ¶ 10,265 (D. D.C.); *Rios* v. *Morton*, D. Colo., Civ. No. C–5499, decided September 25, 1975.

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Title VII case should be limited to the administrative record. An aggrieved employee presumptively would be given a full and fair opportunity to present his case and to build a record on the administrative level, and if he demonstrates that he did not in fact receive that opportunity the reviewing court would reverse the administrative decision. In those rare instances, discussed above, where judicial review cannot adequately be bottomed on the administrative record, the district court possesses the discretion to entertain supplementary proceedings, including trial *de novo* where appropriate, while according the administrative record the great weight that it deserves. Cf. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 60, n. 21.[46]

D. THE JUDGMENT BELOW IS CORRECT

Under the standard we have urged above, the court of appeals was correct in concluding that petitioner

[46] Trial *de novo*, for example, would normally be required (at least in the absence of an agency decision before trial) when suit has been instituted after the expiration of 180 days from the filing of an administrative complaint without final agency action. In circumstances which show that the complainant has delayed the administrative process, however, it would be consistent with the dual congressional purpose of giving the agency primary responsibility for the elimination of employment discrimination, while encouraging speedy agency action, to permit the agency to seek a stay of the court proceedings. The agency would be required to demonstrate that it has been acting with due diligence, that it anticipates issuance of an order within a resonable time, and that the case or order is exceptional. Such a procedure was originally incorporated into the federal employee provisions of the Senate Committee Bill, but was inadvertently eliminated when the EEOC authority to hold administrative hearings was removed. See *supra*, pp. 44–45, n. 22.

was not entitled to a trial *de novo* in the district court and that the judgment should be affirmed. This suit was filed within 30 days of receipt of notice of final action by the Civil Service Commission based upon a complete administrative record, and thus does not involve the 180-day provisions of Section 717(c). Moreover, petitioner requested and received a full evidentiary hearing before a complaints examiner.

Nor does the record indicate that exercise of district court subpoena power would have produced evidence supporting petitioner's discrimination claim. As the court below noted, "there was no offer of proof or suggestion that new and material evidence likely to produce a different result would be forthcoming if the record were reopened" (515 F. 2d at 255; Pet. App. 41a). The selecting official testified at length and was subject to cross-examination (A.R. 56–69). Moreover, all of the hearing witnesses requested by petitioner were government employees and therefore within the complaints examiner's power to compel them to testify (A.R. 143–145). 5 C.F.R. 713.218(e).

Although the examiner initially disapproved 19 of the 24 witnesses requested by petitioner because their expected testimony did not appear to be relevant to the issue of whether petitioner had been discriminated against (A.R. 118, 141), the examiner reconsidered and approved 4 of the 19 previously-excluded witnesses (A.R. 118).[47] It is true that one of these, Mrs.

[47] The complaints examiner's decision not to summon several of petitioner's proposed witnesses itself reflects no procedural unfairness. Even in court a party has no right to call every witness

Murrell Long, did not appear because she did not wish to testify (A.R. 118), but she had been suggested as a witness only because she assertedly had "[r]efused to sign [a] deposition given under oath by the EEO Investigator" (A.R. 144). There is no indication in the administrative record that Mrs. Long would have given evidence supportive of petitioner's discrimination claim, that petitioner requested the hearing examiner to produce Mrs. Long through further administrative procedures, or that petitioner complained of the absence of Mrs. Long's live testimony on appeal to the Civil Service Commission. Similarly, the examiner's decision not to call Mr. Dineros, the person selected instead of petitioner, was within her discretion. Although petitioner contends that the selectee could have testified to his qualifications for the job of Supervisory Claims Examiner, those qualifications were not themselves in issue at the hearing; the significant factor was the good faith belief of the members of the selecting panel and the selecting official that Mr. Dineros was better qualified.[48] Each member of the panel and the selecting official testified fully at the administrative hearing.

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he desires. See, *e.g.*, *May* v. *United States*, 175 F. 2d 994, 1010 (C.A.D.C.), certiorari denied, 338 U.S. 830; *Gajewski* v. *United States*, 321 F. 2d 261 (C.A. 8), certiorari denied, 375 U.S. 968. The examiner's refusal in this case to allow testimony by persons with no apparent knowledge of the contested issues was consistent with the discretionary power frequently exercised by trial courts.

[48] For example, if the selecting official had chosen a person other than petitioner in the honest belief that that person was more

Accordingly, no special circumstances exist that would justify a departure from the usual substantial evidence review of the administrative record, and petitioner was properly refused a trial *de novo*. While the district court and the court of appeals in this case apparently applied a somewhat broader standard of review than that which we suggest is applicable, both courts found that the administrative decision was based upon the weight of the evidence, that agency procedures were adequate, and that there were no errors of law. These conclusions are fully supported by the record. The decision below is therefore correct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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FEBRUARY 1976.

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qualified, and if that decision was in no way influenced by consideration of race, color, religion, sex, or national origin, petitioner would not be entitled to relief *under Title VII* even if she in fact were more capable to fill the position than the selectee.

APPENDIX A

CIVIL RIGHTS ACT OF 1964 AS AMENDED

AN ACT To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY[1]

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions*, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code)*, *or* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972*, persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers*.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the

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[1] Includes 1972 amendments made by P.L. 92-261 printed in italic.

purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or* (*B*) *fifteen* or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, *except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the excercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of

the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution*, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution*, or society of its *activities.*

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit. segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs*, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, in-*

cluding on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. *Members of the Commission* shall be appointed by the President by and with the advice and consent of the *Senate* for a term of five *years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.* The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and *except as provided in subsection (b)*, shall appoint, in accordance with the *provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.*

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to *intervene* in a civil action brought *under section 706* by an aggrieved party *against a respondent other than a government, governmental agency, or political subdivision.*

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) *The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

(b) Whenever *a charge is filed by or on behalf of a* person claiming to be aggrieved, or by a member of the Commission, *alleging* that an employer, employment agency, labor *organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* has engaged in an unlawful employment practice, the Commission shall *serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on* such employer, employment agency, labor *organization, or joint labor-management committee* (hereinafter referred to as the "respondent") *within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges* shall not be made public by the Commission. If the Commission *determines* after such investigation that there is *not* reasonable cause to believe that the charge is true, *it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,* the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such *informal* endeavors may be made public by the *Commission, its officers or employees, or used as evidence in a subsequent proceeding* without the written consent of the *persons concerned.* Any *person* who *makes* public information in violation of this subsection shall be fined not more than $1,000 or imprisoned *for* not more than one *year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) from the date upon which the Commission is authorized to take action with respect to the charge.*

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts

upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective *date* of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under *this section* shall be filed within *one hundred and eighty* days after the alleged unlawful employment practice *occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter,* except that in *a* case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof,* such charge shall be filed by *or on behalf of* the person aggrieved within *three hundred* days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) *or* (d), the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission,* the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a*

case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission,* or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) *or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under *this section*, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under *this section* and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a

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complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all

court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, *engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and* utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, *pay by advance or reimbursement* such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) *Every* employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable,

necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and *to* furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, *and, if such application for an exemption is denied*, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. *If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.*

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of

the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under the section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of *sections 111 and 1114* title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. *Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official*

functions under this Act shall be punished by imprisonment for any term of years or for life.

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of

the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department

agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

APPENDIX B

THE CIVIL SERVICE COMMISSION'S EQUAL OPPORTUNITY REGULATIONS

PART 713—EQUAL OPPORTUNITY

SUBPART B—EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Subpart B of Part 713 Equal Opportunity is revised to implement the Equal Employment Opportunity Act of 1972, 86 Stat. 103, and to strengthen the system of complaint processing. Among others, these changes emphasize the affirmative aspects of agency equal employment opportunity obligations, set out requirements for submission of national and regional plans, extend the time limits for contacting a counselor, provide for the reasonable accommodation to the religious needs of applicants and employees, provide for timely investigation and resolution of complaints including complaints of coercion and reprisal, set out the remedial action available(including back pay), and strengthen the third party complaint system.

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AUTHORITY: The provisions of this Subpart B issued under 5 U.S.C. 1301, 3301, 3302, 7151–7154, 7301; 86 Stat. 111; E.O. 10577; 3 CFR, 1934–58 Comp., p. 218, E.O. 11222, 3 CFR 1964–1965 Comp., p. 306, E.O. 11478, 3 CFR 1969 Comp.

SUBPART B—EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

General Provisions

§ 713.201 PURPOSE AND APPLICABILITY

(a) Purpose. This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations without regard to race, color, religion, sex, or national origin and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's decision or other final action on his complaint of discrimination on grounds of race, color, religion, sex, or national origin.

(b) Applicability. (1) This subpart applies: (i) To military department as defined in section 102 of title 5, United States Code, executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, the U.S. Postal Service, and the Postal Rate Commission, and to the employees thereof, including employees paid from nonappropriated funds, and (ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

§ 713.202 GENERAL POLICY

It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to pro-

hibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

§ 713.203 AGENCY PROGRAM

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employee by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis;

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability;

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h) Provide recognition to employees, supervisors, managers, and units demonstrating superior acomplishment in equal employment opportunity;

(i) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation;

(j) Provide for counseling employees and applicants who believe they have been discriminated against because of race, color, religion, sex, or national origin and for resolving informally the matters raised by them;

(k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin; and

(l) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.

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§ 713.204 IMPLEMENTATION OF AGENCY PROGRAM

To implement the program established under this subpart, an agency shall:

(a) Develop the plans, procedures, and regulations necessary tc carry out its program established under this subpart;

(b) Appraise its personnel operations at regular intervals to assure their conformity with the policy in § 713.202 and its program established in accordance with § 713.203;

(c) Designate a Director of Equal Employment Opportunity and as many Equal Opportunity Officers, Equal Employment Opportunity Counselors, Federal Women's Program Coordinators, and other persons as may be necessary, to assist the head of the agency to carry out the functions described in this subpart in all organizational units and locations of the agency. The functioning and the qualifications of the persons so designated shall be subject to review by the Commission. The Director of Equal Employment Opportunity shall be under the immediate supervision of the head of his agency, and shall be given the authority necessary to enable him to carry out his responsibilities under the regulations in this subpart;

(d) Assign to the Director of Equal Employment Opportunity the functions of;

(1) Advising the head of his agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports, and other matters pertaining to the policy in § 713.202 and the agency program required to be established under § 713.203;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction needed, including remedial or

disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling by an Equal Employment Opportunity Counselor, of any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin and for attempting to resolve on an informal basis the matter raised by the employee or applicant before a complaint of discrimination may be filed under § 713.214;

(5) Providing for the receipt and investigation of individual complaints of discrimination in personnel matters within the agency, subject to §§ 713.211 through 713.222;

(6) Providing for the receipt, investigation, and disposition of general allegations by organizations or other third parties of discrimination in personnel matters within the agency subject to § 713.251.

(7) When authorized by the head of the agency, making the decision under § 713.221 for the head of the agency on complaints of discrimination and ordering such corrective measures as he may consider necessary, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee has been found to have engaged in a discriminatory practice; and

(8) When not authorized to make the decision for the head of the agency on complaints of discrimination, reviewing at his

discretion, the record on any complaint before the decision is made under § 713.221 and making such recommendations to the head of the agency or his designee as he considers desirable, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee is found to have engaged in a discriminatory practice;

(e) Insure that equal opportunity for women is an integral part of the agency's overall program by assigning to the Federal Women's Program Coordinators the function of advising the Director of Equal Employment Opportunity on matters affecting the employment and advancement of women;

(f) Publicize to its employees and post permanently on official bulletin boards:

(1) The names and addresses of the Director of Equal Employment Opportunity and the Federal Women's Program Coordinators;

(2) The name and address of the appropriate Equal Employment Opportunity Officer;

(3) The name and address of the Equal Employment Opportunity Counselor and the organizational units he serves; his availability to counsel an employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin; and the requirement that an employee or applicant for employment must consult the Counselor as provided by § 713.213 about his allegation of discrimination because of race, color, religion, sex, or national origin before a complaint as provided by § 713.214 may be filed; and

(4) Time limits for contacting an Equal Employment Opportunity Counselor.

(g) Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by substitution of another qualified employee, by a grant of leave, a change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so; and

(h) Make readily available to its employees a copy of its regulations issued to carry out its program of equal employment opportunity.

(i) Submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to—

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

§ 713.205 COMMISSION REVIEW AND EVALUATION OF AGENCY PROGRAM OPERATIONS

The Commission shall review and evaluate agency program operations periodically, obtain

such reports as it deems necessary, and report to the President as appropriate on overall progress. When it finds that an agency's program operations are not in conformity with the policy set forth in § 713.202 and the regulations in this subpart, the Commission shall require improvement or corrective action to bring the agency's program operations into conformity with this policy and the regulations in this subpart. The head of each department and agency shall comply with the rules, regulations, orders, and instructions issued by the Commission.

Agency Regulations for Processing Complaints of Discrimination

§ 713.211 GENERAL

An agency shall insure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, or national origin comply with the principles and requirements in §§ 713.212 through 713.222.

§ 713.212 COVERAGE

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with that agency who believes that he has been discriminated against because of race, color, religion, sex, or national origin. A complaint may also be filed by an organization for the aggrieved person with his consent

(b) Sections 713.211 through 713.222 do not apply to the consideration by an agency of a general allegation of discrimination by an organization or other third party which is unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222. (Section 713.251 applies to general allegations by organizations or other third parties.)

§ 713.213 PRECOMPLAINT PROCESSING

(a) An agency shall require that an aggrieved person who believes that he has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of his counseling activities so as to brief periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing his actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct his final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to his attention by the aggrieved person. If the final interview is not concluded within 21 days and the matter has not previously been resolved to the satisfaction of the aggrieved person, shall be informed in writing at that time of his right to file a complaint of discrimination. The notice shall inform the complainant of his right to file a complaint at any time after receipt of the notice up to 15 calendar days after the final interview (which shall be so identified in writing by the Equal Employment Opportunity Counselor) and the appropriate official with whom to file a complaint. The Counselor shall not attempt in any way to re-

strain the aggrieved person from filing a formal complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who has come to him for consultation, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from him.

(b) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(c) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the peformance of his duties under this section.

§ 713.214 FILING AND PRESENTATION OF COMPLAINT

(a) Time limits. (1) An agency shall require that a complaint be submitted in writing by the complainant or his representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if—

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter, or, if a personnel action, within 30 calendar days of its effective date; and

(ii) The complainant or his representative submitted his written complaint to an appropriate official within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity Officer, a Federal Women's Program Coordinator, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with subparagraph (3) of this paragraph.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge to the complainant or his representative in writing receipt of the complaint and advise the complaintant in writing of all his administrative rights and of his right to file a civil action as set forth in § 713.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section: (i) When the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances bevond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency.

(b) Presentation of complaint. At any stage in the presentation of a complaint, including the counseling stage under § 713.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency

and ne designates another employee of the agency as his representative, the representative, shall have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.

§ 713.215 REJECTION OR CANCELLATION OF COMPLAINT

The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of § 713.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. He may cancel a complaint because of failure of the complainant to prosecute the complaint. He shall transmit the decision to reject or cancel by letter to the complainant and his representative. The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted and of his right to file a civil action as described in § 713.281.

§ 713.216 INVESTIGATION

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under

oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from, records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the

person conducting the investigation a written authorization: (1) To investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

§ 713.217 ADJUSTMENT OF COMPLAINT AND OFFER OF HEARING

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. If the agency does not carry out, or rescinds, any action specified by the terms of the adjustment for any reason not attributable to acts or conduct of the complainant the agency shall, upon the complainant's written request, reinstate the complaint for further processing from the point processing ceased under the terms of the adjustment.

(b) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing: (1) Of the proposed disposition of complaint, (2) of his right to a hearing and decision by the agency head or his designee if he notifies the agency in writing within 15 calendar days of the receipt of the notice that he desires a hearing, and (3) of his right to a

decision by the head of the agency or his designee without a hearing.

(c) If the complainant fails to notify the agency of his wishes within the 15-day period prescribed in paragraph (b) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (b) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and his representative which shall inform the complainant of his right of appeal to the Commission and the time limit applicable thereto and of his right to file a civil action as described in § 713.231. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complainant, together with the complaint file shall be forwarded to the head of the agency, or his designee, for decision under § 713.221.

§ 713.218 HEARING.

(a) Complaints examiner. The hearing shall be held by a complaints examiner who must be an employee of another agency except when the agency in which the complaint arose is: (1) The government of the District of Columbia, or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency, in which event the agency shall arrange with the Commission for the selection of an impartial employee of the agency to serve as complaints examiner. (For purposes of this paragraph, the Department of Defense

is considered to be a single agency.) The agency in which the complaint arose shall request the Commission to supply the name of a complaints examiner who has been certified by the Commission as qualified to conduct a hearing under this section.

(b) Arrangements for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 713.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the complaints examiner in making his recommended decision on the complaint), to the complaints examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the complaints examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 713.216 apply to any further investigation by the agency on the complaint. The complaints examiner shall schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1) Attendance at the hearing is limited to persons determined by the complaints examiner to have a direct connection with the complaint.

(2) The complaints examiner shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the complaints examiner shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the

representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Powers of complaints examiner. In addition to the other powers vested in the complaints examiner by the agency in accordance with this subpart, the agency shall authorize the complaints examiner to:

(1) Administer oaths or affirmations;
(2) Regulate the course of the hearing;
(3) Rule on offers of proof;
(4) Limit the number of witnesses whose testimony would be unduly repetitious; and
(5) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(e) Witnesses at hearing. The complaints examiner shall request any agency subject to this subpart to make available as a witness at the hearing an employee requested by the complainant when he determines that the testimony of the employee is necessary. He may also request the appearance of an employee of any Federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The complaints examiner shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the complaints examiner and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the complaints examiner. If the explanation is inadequate, the

complaints examiner shall so advise the agency and request it to make the employee available as a witness at the hearing. If the explanation is adequate, the complaints examiner shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee through a written interrogatory. An employee of an agency shall be in a duty status during the time he is made available as a witness.

(f) Record of hearing. The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the complaints examiner at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

(g) Findings, analysis, and recommendations. The complaints examiner shall transmit to the head of the agency or his designee: (1) The complaint file (including the record of the hearing), (2) the findings and analysis of the complaints examiner with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the complaints examiner on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The complaints examiner shall notify the complainant of the date on which this was done. In addition, the complaints examiner shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

§ 713.219 RELATIONSHIP TO OTHER AGENCY APPELLATE PROCEDURES

(a) Except as provided in paragraphs (b) and (c) of this section, when an employee makes a written allegation of discrimination on grounds of race, color, religion, sex, or national origin, in connection with an action that would otherwise be processed under a grievance or appeals system of the agency, the agency may process the allegation of discrimination under that system when the system meets the principles and requirements in §§ 713.212 through 713.220 and the head of the agency, or his designee, makes the decision of the agency on the issue of discrimination. That decision on the issue of discrimination shall be incorporated in and become a part of the decision on the grievance or appeal.

(b) An allegation of discrimination made in connection with an appeal under Subpart B of Part 771 of this chapter shall be processed under that subpart.

(c) An allegation of discrimination made in connection with a grievance under Subpart C of Part 771 of this chapter shall be processed under this part.

§ 713.220 AVOIDANCE OF DELAY

(a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved within 180 calendar days after it was filed, including time spent in the processing of the complaint by the complaints examiner under § 713.218.

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(b) The head of the agency or his designee may cancel a complaint if the complainant fails to prosecute the complaint without undue delay. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

(c) The agency shall furnish the Commission monthly reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply a complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 calendar days after the date the complaint was filed, the complaints examiner's recommended decision shall become a final decision binding on the agency 30 calendar days after its submission to the agency. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the complaints examiner under § 713.218(g) and a copy of the hearing record and also shall notify him in writing of his right

of appeal to the Commission and the time limits applicable thereto and of his right to file a civil action as described in § 713.281.

§ 713.221 DECISION BY HEAD OF AGENCY OR DESIGNEE

(a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing and shall be transmitted by letter to the complainant and his representative. When there has been no hearing, the decision shall contain the specific reasons in detail for the agency's action, including any remedial action taken.

(2) When there has been a hearing on the complaint, the decision letter shall transmit a copy of the findings, analysis, and recommended decision of the complaints examiner under section 713.218(g) and a copy of the hearing record. The decision of the agency shall adopt, reject, or modify the decision recommended by the complaints examiner. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejection or modification.

(3) When there has been no hearing and no decision under § 713.217(c), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall require

remedial action to be taken in accordance with § 713.271, shall review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and shall record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be included in the complaint file.

(d) The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission of his right to file a civil action in accordance with § 713.281, and of the time limits applicable thereto.

§ 713.222 COMPLAINT FILE

The agency shall establish a complaint file. Except as provided in § 713.221(c), this file shall contain all documents pertinent to the complaint. The complaint file shall include copies of: (a) The notice of the Equal Employment Opportunity Counselor to the aggrieved person under § 713.213(a), (b) the written report of the Equal Employment Opportunity Counsel under § 713.213 to the Equal Employment Opportunity Officer on whatever precomplaint counseling efforts were made with regard to the complainant's case, (c) the complaint, (d) the investigative file, (e) if the complaint is withdrawn by the complainant, a written statement of the complainant or his representative to that effect, (f) if adjustment of the complaint is arrived at under § 713.217, the written record of the terms of the adjustment, (g) if no adjustment of the complaint is arrived at under § 713.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of his right to a hearing, (h) if decision is made under §713.217(c), a copy of the letter to the complainant transmitting that decision, (i) if a hearing was held, the record of the hearing, together with the complaints ex-

aminer's findings, analysis, and recommended decision on the merits of the complaint, (j) if the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by him to the head of the agency or his designee, and (k) if decision is made under § 713.221, a copy of the letter transmitting the decision of the head of the agency or his designee. The complaint file shall not contain any document that has not been made available to the complainant or to his designated physician under § 294.401 of this chapter.

APPEAL TO THE COMMISSION

§ 713.231 ENTITLEMENT

(a) Except as provided by paragraph (b) of this section, a complainant may appeal to the Commission the decision of the head of the agency, or his designee:

(1) To reject his complaint, or a portion thereof, for reasons covered by § 713.215; or

(2) To cancel his complaint because of the complainant's failure to prosecute his complaint; or

(3) On the merits of the complaint, under § 713.217(c) or § 713.221, but the decision does not resolve the complaint to the complainant's satisfaction.

(b) A complainant may not appeal to the Commission under paragraph (a) of this section when the issue of discrimination giving rise to the complaint is being considered, or has been considered, in connection with any other appeal by the complainant to the Commission.

§ 713.232 WHERE TO APPEAL

The complainant shall file his appeal in writing, either personally or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415.

§ 713.233 TIME LIMIT

(a) Except as provided in paragraph (b) of this section, a complainant may file an appeal at any time after receipt of his agency's notice of final decision on his complaint but not later than 15 calendar days after receipt of that notice.

(b) The time limit in paragraph (a) of this section may be extended in the discretion of the Board of Appeals and Review, upon a showing by the complainant that he was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

§ 713.234 APPELLATE PROCEDURES

The Board of Appeals and Review shall review the complaint file and all relevant written representations made to the board. The board may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. This subpart applies to any further investigation or rehearing resulting from a remand from the board. There is no right to a hearing before the board. The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof the complainant, his designated representative, and the agency. When corrective action is ordered, the agency shall report promptly to the board that the corrective action has been taken. The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with § 713.282.

§ 713.235 REVIEW BY THE COMMISSIONERS

The Commissioners may, in their discretion, reopen and reconsider any previous decision

when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued:

(2) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or

(3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

§ 713.236 RELATIONSHIP TO OTHER APPEALS

When the basis of the complaint of discrimination because of race, color, religion, sex, or national origin involves an action which is otherwise appealable to the Commission and the complainant having been informed by the agency of his right to proceed under this subpart elects to proceed by appeal to the Commission, the case, including the issue of discrimination, will be processed under the regulations appropriate to that appeal when the complainant makes a timely appeal to the Commission in accordance with those regulations.

REPORTS TO THE COMMISSION

§ 713.241 REPORTS TO THE COMMISSION ON COMPLAINTS

Each agency shall report to the Commission information concerning precomplaint counseling and the status and disposition of complaints under this subpart at such times and in such manner as the Commission prescribes.

THIRD PARTY ALLEGATIONS

§ 713.251 THIRD-PARTY ALLEGATION OF DISCRIMINATION

(a) Coverage. This section applies to general allegations by organizations or other third parties of discrimination in personnel matters within the agency which are unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222.

(b) Agency procedure. The organization or other third party shall state the allegation with sufficient specificity so that the agency may investigate the allegation. The agency may require additional specificity as necessary to proceed with its investigation. The agency shall establish a file on each general allegation, and this file shall contain copies of all material used in making the decision on the allegation. The agency shall furnish a copy of this file to the party submitting the allegation and shall make it available to the Commission for review on request. The agency shall notify the party submitting the allegation of its decision, including any corrective action taken on the general allegations, and shall furnish to the Commission on request a copy of its decision.

(c) Commission procedures. If the third party disagrees with the agency decision, it may, within 30 days after receipt of the decision, request the Commission to review it. The request shall be in writing and shall set forth with particularity the basis for the request. When the Commission receives such a request, it shall make, or require the agency to make, any additional investigations the Commission deems necessary. The Commission shall issue a decision on the allegation ordering such corrective action, with or without back pay, as it deems appropriate.

FREEDOM FROM REPRISAL OR INTERFERENCES

§ 713.261 FREEDOM FROM REPRISAL

(a) Complainants, their representatives, and witnesses shall be free from restraint interference, coercion, discrimination, or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage under section 713, or any time thereafter.

§ 713.262 REVIEW OF ALLEGATIONS OF REPRISAL

(a) Choice of review procedures. A complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint under this subpart, may, if an employee or applicant, have the allegation reviewed as an individual complaint of discrimination subject to §§ 713.211 through 713.222 or as a charge subject to paragraph (b) of this section.

(b) Procedure for review of charges. (1) An employee or applicant may file a charge of restraint, interference, coercion, discrimination or reprisal, in connection with the presentation of a complaint with an appropriate agency official as defined in § 713.214(a)(2) within 15 calendar days of the date of the alleged occurrence. The charge shall be in writing and shall contain all pertinent facts. Except as provided in subparagraph (2) of this paragraph, the agency shall undertake an appropriate inquiry into such a charge and shall forward to the Commission within 15 calendar days of the date of its receipt a copy of the charge and report of action taken. The agency shall also provide the charging party with a copy of the report of action taken. When the agency has not completed an appropriate inquiry 15 calendar days after receipt of such a charge, the

charging party may submit a written statement with all pertinent facts to the Commission, and the Commission shall require the agency to take whatever action is appropriate.

(c) When a complainant, after completion of the investigation of his complaint under § 713.216, requests a hearing and in connection with that complaint alleges restraint, interference, coercion, discrimination, or reprisal, the complaints examiner assigned to hold the hearing shall consider the allegation as an issue in the complaint at hand or refer the matter to the agency for further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

Remedial Actions

§ 713.271 REMEDIAL ACTIONS

(a) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Backpay, computed in the same manner prescribed by § 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by § 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but does not find that the individual is the one who would have been hired except for discrimination, the agency shall consider the individual for any existing vacancy of the type and grade for which he had been considered initially and for which he is qualified before consideration is given to other candidates. If the individual is not selected, the agency shall record the reasons for nonselection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) A period of retroactivity or a period for which backpay is awarded under this paragraph may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. If a finding of discrimination was not based on a complaint, the period of retroactivity or period for which

backpay is awarded this paragraph may not extend earlier than 2 years prior to the date the finding of discrimination was recorded.

(b) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by § 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

Right To File a Civil Action

§ 713.281 STATUTORY RIGHT

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate U.S. District Court within:

(a) Thirty (30) calendar days of his receipt of notice of final action taken by his agency on a complaint.

(b) One hundred-eighty (180) calendar days from the date of filing a complaint with his agency if there has been no decision.

(c) Thirty (30) calendar days of his receipt of notice of final action taken by the Commission on his complaint, or,

(d) One hundred-eighty (180) calendar days from the date of filing an appeal with the Commission if there has been no Commission decision.

§ 713.282 NOTICE OF RIGHT

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 713.215 and 713.217, or § 713.221. The Commission shall notify an employee or applicant of his right to file a civil

action, and of the 30-day time limit for filing, in any decision under § 713.234.

§ 713.283 EFFECT ON ADMINISTRATIVE PROCESSING

The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

UNITED STATES CIVIL SERVICE COMMISSION,

[SEAL] JAMES C. SPRY,

Executive Assistant to the Commissioners.

[FR Doc. 72-18054 Filed 10-20-72; 8:49 am]

U. S. GOVERNMENT PRINTING OFFICE : 1976 O - 213-385